Supreme Court, U.S.
FILED
93 1137 JAN 11 1994
OFFICE OF THE CLERK

No. 93-

In The

Supreme Court of the United States

October Term, 1993

OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

v.

JOHN KOCHAN,
CLARENCE GRANGER AND HILMA GRANGER,
HERMAN DAVIS AND ELIZABETH DAVIS,
HARRY RENEAU AND ARVADA RENEAU,
CLARENCE WOODWARD AND URSEL WOODWARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

AND APPENDIX

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QUESTIONS PRESENTED

I.

WHETHER, IN MASS TORT LITIGATION ARISING OUT OF THE SAME GENERAL COURSE OF CONDUCT, THE IMPOSITION OF SERIAL PUNITIVE DAMAGE AWARDS VIOLATES SUBSTANTIVE DUE PROCESS WHERE THE AGGREGATE AMOUNT OF THE DAMAGES AWARDED IS GREATER THAN REASONABLY NECESSARY TO PUNISH AND DETER.

II.

WHETHER A STATE PROCEDURAL RULE WHICH REQUIRES A DEFENDANT TO SUBMIT "PUNITIVE DAMAGES OVERKILL" EVIDENCE TO THE JURY, RATHER THAN TO THE COURT AFTER VERDICT, IS FUNDAMENTALLY UNFAIR SO AS TO DEPRIVE DEFENDANTS OF PROCEDURAL DUE PROCESS.

LIST OF PARTIES AND RULE 29.1 STATEMENT

Petitioner Owens-Corning Fiberglas Corporation was the defendant in the Circuit Court for the County of Madison, Illinois, the appellant in the Appellate Court of Illinois and the petitioner in the Supreme Court of Illinois. Respondents John Kochan, Clarence and Hilma Granger, Herman and Elizabeth Davis, Harry and Arvada Reneau and Clarence and Ursel Woodward were the plaintiffs in the circuit court, the appellees in the appellate court and the respondents in the supreme court.

Pursuant to Rule 29.1 of the Rules of this Honorable Court, petitioner Owens-Corning Fiberglas Corporation states that it is a publicly-held corporation, that it has no parent corporation, and that it has no subsidiaries other than wholly-owned subsidiaries.

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CLARENCE WOODWARD AND URSEL WOODWARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

Petitioner Owens-Corning Fiberglas Corporation ("petitioner") respectfully prays that a writ of certiorari issue to review the opinion and order of the Appellate Court of Illinois, Fifth District, entered in this proceeding on February 23, 1993, as to which leave was denied by the Supreme Court of Illinois on October 6, 1993.

OPINION BELOW

The opinion of the Appellate Court of Illinois, Fifth District, denying petitioner's Motion for Judgment Notwithstanding the Verdict, Or In The Alternative, For New Trial or Remittitur, is reported at 242 Ill. App.3d 781; 610 N.E.2d 683, and is reprinted in the appendix at

A-2. The order of the Supreme Court of Illinois denying petitioner's Petition for Leave to Appeal is unreported, and is reprinted in the appendix at A-56.

JURISDICTION

The order of the Supreme Court of Illinois denying petitioner's Petition for Leave to Appeal was entered on October 6, 1993. Petitioner's application for extension of time was granted on January 6, 1994, extending the time for filing this petition for certiorari to and through January 11, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This petition involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution, reprinted at A-1.

INTRODUCTION TO ARGUMENT

Punitive damages are a powerful weapon; imposed indiscriminately, they have a devastating potential for harm. *Pacific Mut. Life Ins. Co.* v. *Haslip*, 113 L. Ed. 2d 1, 35 (1991) (O'Connor, dissenting). In recent years, the frequency and size of punitive awards have skyrocketed, causing one commentator to observe that "hardly a month goes by without a multimillion dollar punitive damages award in a product liability case." Wheeler, "A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation," 40 Ala. L. Rev. 919 (1989).

This explosion of punitive awards has exposed the constitutional defects that inhere in the common-law

system that permits such awards. *Pacific Mut. Life Ins. Co.* v. *Haslip*, *supra* at 48 (O'Connor, dissenting). Nowhere is that clearer than in mass tort litigation, an area in which the applicability of the theories underlying punitive damages frequently has been questioned. *See In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300, 305-307 (6th Cir. 1984), *In re N. Dist. of Cal., Dalkon Shield IUD Prod. Liab. Litig.*, 693 F.2d 847, 851-852 (9th Cir. 1982), *In re Fed. Skywalk Cases*, 680 F.2d 1175, 1179-1183 (8th Cir. 1982), *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983), *aff'd.* 818 F.2d 145 (2nd Cir. 1987).

Because punitive damages are imposed for the purpose of retribution and deterrence, *Haslip*, *supra* at 22, at some point multiple punitive awards in mass tort cases exceed that purpose and violate due process. Jeffries, "A Comment on the Constitutionality of Punitive Damages," 72 Va. L. Rev. 139, 140 (1986).[1] This point has been reached in asbestos litigation, where hundreds of millions of dollars have been paid, and continue to be paid, in settlements and verdicts.

Absent a legislative solution, only this Court can act to halt the continuing injustice resulting from repetitive punitive awards. *Dunn* v. *HOVIC*, *supra* at 1387.[2] As Judge

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1 *See also Dunn* v. *HOVIC*, 1 F.3d 1371 1389-1391 (3rd Cir. 1993), *Simpson* v. *Pittsburgh Corning*, 901 F.2d 277, 281-282 (2d Cir. 1990), *Johnson* v. *Celotex Corp.*, 899 F.2d 1281, 1287-1288 (3d Cir. 1990), *In re School Asbestos Litig.*, 789 F.2d 996, 1005 (3d Cir. 1986), *Sealover* v. *Carey Canada*, 793 F. Supp. 569, 580-582 (M.D. Pa. 1992), *Juzwin* v. *Amtorg Trading Co.*, 705 F. Supp. 1053 (D.N.J. 1989), *vacated on other grounds* 718 F. Supp. 1233 (D.N.J. 1989), *In re Dalkon Shield IUD Prod. Liab. Litig.*, *supra* at 898-900, *In re "Agent Orange" Prod. Liab. Litig. supra.*

2 *See also Sealover* v. *Carey Canada*, *supra* at 582, *Garnes* v. *Fleming Landfill, Inc.*, 186 W.Va. 656; 413 S.E.2d 897, 905-906 (W. Va. 1991), Jones, et al, "Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process," 43 Ala. L. Rev. 1, 32-33 (1991).

Weis stated in his dissent in *Dunn*: "It is judicial paralysis, not activism, that is the problem in this area." *Id.* at 1399.

This Court should delay no further in addressing the due process concerns raised by the serial imposition of punitive damage awards in mass tort litigation arising out of the same course of conduct.

STATEMENT OF THE CASE

In their separate complaints filed in the Circuit Court for the County of Madison, Illinois, plaintiffs John Kochan, Clarence Granger, Herman Davis, Harry Reneau and Clarence Woodward each alleged that he was injured as a result of exposure to asbestos-containing insulation manufactured by petitioner. Plaintiffs Hilma Granger, Elizabeth Davis, Arvada Reneau and Ursel Woodward asserted derivative claims for loss of consortium. Each of the complaints named petitioner as one of multiple defendants, and each sought compensatory and punitive damages.

These five cases, together with four others which are not before this Court,[3] were consolidated for a trial which commenced on October 9, 1990. As a result of settlements with the other defendants, petitioner was the only remaining defendant at the time of the jury's verdicts.

After a trial spanning four weeks, the jury returned verdicts in favor of Kochan, the Grangers, the Davises, the Reneaus and the Woodwards, and awarded them compensatory damages in the following amounts: Kochan:

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[3] **The jury returned verdicts in favor of petitioner in those four cases.**

$188,500; the Grangers: $435,000; the Davises: $138,000; the Reneaus: $332,500; and the Woodwards: $480,000. In addition, the jury awarded $1 million in punitive damages in each of the five cases.

Petitioner filed a post-trial motion for judgment notwithstanding the verdict, requesting the court to review the jury's punitive damage awards on the ground that the aggregate punitive damage awards assessed against petitioner violated the Due Process Clause of the Fourteenth Amendment. In support of its motion, petitioner filed the Affidavit of Robert A. McOmber, Litigation Counsel for petitioner (reprinted at A-91), setting forth the punitive damage awards which had been assessed against petitioner in previous cases. The trial court denied petitioner's motion without discussing the merits of this issue, finding that it had been waived by petitioner's failure to submit the Affidavit to the jury during trial.

Petitioner timely filed notices of appeal in each of these five cases, which were consolidated in the Illinois Appellate Court, Fifth District. On February 23, 1993, the appellate court issued its opinion and order affirming the judgment of the trial court. Like the trial court, the appellate court found that petitioner had waived the right to appeal the issue of multiple punitive damage awards because petitioner did not present the Affidavit for the jury's consideration during trial.

The Supreme Court of Illinois denied petitioner's petition for leave to appeal by order dated October 6, 1993.

REASONS FOR GRANTING THE WRIT

I.

IN MASS TORT LITIGATION, THE IMPOSITION OF SERIAL PUNITIVE DAMAGE AWARDS IN SEPARATE ACTIONS ARISING OUT OF THE SAME GENERAL COURSE OF CONDUCT VIOLATES SUBSTANTIVE DUE PROCESS WHERE THE AGGREGATE AMOUNT OF THE DAMAGES AWARDED IS GREATER THAN IS REASONABLY NECESSARY TO PUNISH AND DETER.

In *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. ___; 113 L. Ed. 2d 1, 22-23 (1991), this Court for the first time held that civil defendants have both procedural and substantive due process rights protecting them against punitive damage awards which are assessed and reviewed without meaningful constraints on the discretion of the fact finder and are "greater than reasonably necessary to punish and deter."

In *Haslip*, the wrongful conduct alleged affected only the plaintiffs who were before the Court. In the area of mass torts, however, the existence of thousands of cases brought by plaintiffs who claim injuries arising out of the same general course of conduct[4] raises a question that is different from, but related to, the question presented in *Haslip*: Assuming that each punitive award is assessed and reviewed under proper standards, and that each award, standing alone, is not unreasonably excessive, may not the aggregate amount

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[4] **Although a defendant's single course of conduct may cause harm to many plaintiffs, most courts consider the wrongful conduct as "the same act or a series of acts" rather than separate transactions with each individual plaintiff. Thus, if successive punitive damage awards are imposed through a multiplicity of suits, each award punishes the defendant for the same conduct. Jones, 43 Ala. L. Rev. at 2 n. 3.**

of all such awards nevertheless "cross the line" into the constitutionally unacceptable?[5]

A. Additional Punitive Awards In Asbestos Litigation No Longer Can Be Justified Where Society's Goals Of Punishment And Deterrence Have Been Fully Served.

1. PUNITIVE AWARDS CANNOT BE JUSTIFIED ON THE BASIS OF DETERRENCE WHERE THE CHALLENGED CONDUCT LONG HAS CEASED.

Punitive damage awards are imposed for purposes of retribution and deterrence. *Haslip*, *supra* at 20.[6] When these goals have been accomplished, use of the weapon no longer is justified. This is true in mass tort litigation arising out of a single course of conduct, where the aggregate effect of such awards may reach far beyond the purposes of punishment and deterrence: Such awards constitute "overkill" and violate due process. Jones, *supra* at 4.

This Court has held that deterrence of future egregious conduct is a primary purpose of punitive damages. *Silkwood* v. *Kerr McGee Corp.*, 464 U.S. 238, 260-261 (1984), citing *Smith* v. *Wade*, 461 U.S. 30, 49 (1983). In the context of asbestos litigation, however, punitive damages do not serve the purpose of deterring future conduct, because the production and use of asbestos-containing products essentially ceased in the United States in the early 1970's.[7] This being so, multiple punitive awards in asbestos cases cannot be justified on the

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5 *See* Jones, 43 Ala. L. Rev. at 21.

6 Illinois adheres to this rationale for the imposition of punitive damages. *Loitz* v. *Remington Arms Co., Inc.*, 138 Ill.2d 404; 563 N.E.2d 397 (1990).

7 *See eg.* Federal Occupational Safety and Health Act of 1970, S. Rep. 91-1282, 91st Cong., 2nd Sess., *reprinted in* 1970 U.S. Code

(*concluded on page 8*)

ground that they will deter the challenged practices in the future.

2. PUNITIVE AWARDS CANNOT BE JUSTIFIED ON THE BASIS OF RETRIBUTION WHERE THE PUNISHMENT IS DISPROPORTIONATE TO THE DEFENDANT'S CULPABILITY.

Yet if punitive awards are to be justified on the sole principle that the punishment of wrongdoing serves a salutary purpose, the constitutional concerns raised by unlimited multiple awards become even more pressing. "[T]o punish the guilty beyond their guilt is not different from punishment of the innocent, and it cannot be done in a manner consistent with ordinary notions of justice." Dobbs, "Ending Punishment in 'Punitive' Damages: Deterrence-Measured Remedies," 40 Ala. L. Rev. 831, 854 (1989).

By definition, punitive damages are based upon the degree of the defendant's culpability. *Massachusetts Bonding & Ins.* v. *United States*, 352 U.S. 128, 133 (1956). Accordingly, multiple punitive awards based upon the same general course of conduct implicate concerns regarding proportionality and repetitiveness that find a correlation in the field of criminal law.

This Court has stated that the Excessive Fines Clause of the Eighth Amendment and the Double Jeopardy Clause of the Fifth Amendment are not directly applicable to suits between private litigants. *Browning-Ferris*

(*continued from page 7*)

Cong. & Admin. News 5175, 5179; "Asbestos Ban and Phasedown Regulations," 40 C.F.R. 763.160 *et seq.* (promulgated by E.P.A. in July, 1989). Petitioner ceased producing asbestos-containing Kaylo in 1972, more than 20 years ago, and no longer produces or distributes any asbestos-containing products (McOmber Affidavit, ¶¶ 4-5, reprinted at A-92).

Indus. v. *Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989), *United States* v. *Halper*, 490 U.S. 435, 451 (1989). Nevertheless, a defendant in a civil action has a right to be protected against unlimited multiple punitive awards, not because they constitute "excessive fines," but because the imposition of such repetitive, unlimited punishment violates that sense of "fundamental fairness" which lies at the heart of constitutional due process.

a. In Asbestos Litigation, The Retributive Function Normally Fulfilled By Punitive Awards Has Been Fully Satisfied By The Punitive Amount Of Compensatory Damages Awarded In Thousands Of Cases.

This Court has held that the Due Process Clause of the Fourteenth Amendment imposes substantive limits "'beyond which penalties may not go.'" *TXO Production, Inc.* v. *Alliance Resources, Inc.*, 125 L. Ed. 2d 366, 376 (1993). Thus due process requires, at some level, that punishment be commensurate with the wrongful conduct for which it is inflicted. *Id.* at 46. In determining how much punishment is enough in the context of mass tort litigation arising from asbestos exposure, this Court must consider not only the nature of punitive damages, but the nature of asbestos litigation itself.

The amount of individual tort litigation arising from asbestos exposure is unparalleled in the history of American tort law. *In re Joint Eastern & Southern Dist. Asbestos Litig.*, 129 B.R. 710, 812 (E. & S.D.N.Y. 1991), *vacated on other grounds* 982 F.2d 721 (2nd Cir. 1992). By 1990, 30,401 asbestos cases were pending in the federal courts alone. Judicial Conference Ad Hoc Comm. on Asbestos Litig., *Report to the Chief Justice of the United States and Members of the Judicial Conference of the*

United States ("Judicial Conference Report")(March. 1991), p. 8.

Moreover, a study completed by the National Center for State Courts reported as many as 129,000 cases pending in state courts, for a total of approximately 160,000 state and federal cases. State Judge Asbestos Litig. Comm., *Megatorts: The Lesson of Asbestos Litigation* (July 21, 1992), *reprinted in* Mealey's Litig. Rep.—Asbestos, Nov. 20, 1992, at B-1.

By early 1991, close to $3 billion had been paid to satisfy claims in asbestos-related personal injury litigation.[8] Such awards may be expected to continue well into the future.[9]

As a result of the avalanche of compensatory claims against asbestos manufacturers, the retributive function normally reserved to punitive damages is being per-

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[8] Edley & Weiler, "Asbestos: A Multi-Billion-Dollar Crisis," 30 Harv. J. Legis. 383, 384, 390 (1993), *citing* Oliver & Spencer, "Who Will The Monster Devour Next?", *Forbes*, Feb, 18, 1991, at 75, 79. Petitioner's experience is illustrative of the magnitude of this litigation. During 1990, 1991 and 1992, petitioner resolved approximately 54,800 asbestos-related claims at a total cost of $539 million for those three years *alone. Owens-Corning Fiberglas Corporation 1993 Third Quarter Report Form 10-Q* ("*1993 Third Quarter 10-Q*"), p. 12, reprinted at A-130–A-131. Through September 30, 1993, petitioner had resolved, by settlement or otherwise, approximately 116,400 asbestos-related personal injury claims. *Id.* at A-130.

[9] The federal Judicial Conference concluded in 1991 that the number of asbestos-related claims "has not begun to crest." Judicial Conference Report, *supra* at 7. Indeed, it has been estimated that between 1990 and 2049, another 668,363 asbestos-related claims will be filed. Stallard & Manton, *Estimates and Projections of Asbestos-Related Mesothelioma and Exposures Among Manville Personal Injury Settlement Trust Claimants, 1990-2049*, at 42 (Draft Nov. 9, 1992), *cited in Dunn* v. *HOVIC*, *supra* at 1394. As of September 30, 1993, approximately 94,000 asbestos-related personal injury claims were pending against petitioner; 11,200 of those claims were received in the third quarter of 1993. *1993 Third Quarter 10-Q*, p. 12, reprinted at A-130.

formed by the compensatory damages that defendants are called upon, and will continue to be called upon, to pay. Surrick, "Punitive Damages and Asbestos Litigation in Pennsylvania: Punishment or Annihilation?", 87 Dick. L. Rev. 265, 295 (1983). It makes no difference that the punishment is labeled "compensatory" when it is awarded in punitive amounts; the effect is the same. *Id.* at 296.

b. Because Punitive Damage Awards Are Stigmatizing, Due Process Requires Procedural Safeguards To Eliminate Standardless Discretion In The Serial Award Of Punitive Damages In Asbestos Litigation.

Punitive damages are not compensation for injury; they are private fines levied by civil juries. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Because punitive awards are windfalls and not compensation, courts should place less emphasis on plaintiffs' rights and focus on the defendants when considering the substantive due process limits on such awards. *See* Wheeler, "The Constitutional Case for Reforming Punitive Damages Procedures," 69 Va. L. Rev. 269, 292 (1983).[10]

The punitive character of punitive damages means that more than just money is at stake. *Haslip*, *supra* at 43 (O'Connor, dissenting). This Court long has recognized that the possibility of stigma weighs heavily in determining the procedural safeguards required by due process. *In re Winship*, 397 U.S. 358 (1970), *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971). Because the stigma implied by a punitive damage award generally is greater than that implied by a compensatory damage award,

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10 *See also, Gertz, supra* at 349 ("[T]he states . . . have no substantial interest in securing for plaintiffs gratuitous awards of money damages far in excess of any actual injury.")

Wheeler, 69 Va. L. Rev. at 283, the due process rights of defendants weigh heavily in the constitutional balance.

In light of these important interests, the standardless discretion now afforded to state and federal juries to enter repetitive punitive damage awards in mass tort litigation cannot be reconciled with the substantive due process rights announced by this Court in *Haslip*. If "adequate guidelines from the court . . . properly enter into the constitutional calculus," *Haslip* at 20, then due process *necessarily* is violated when punitive damages are assessed *without regard* to the existence, number or amount of past punitive awards arising out of the same course of conduct. Due process does not tolerate such cavalier standards when so much is at stake. *TXO Production*, *supra* at 389 (O'Connor, dissenting).

To be constitutionally permissible, the *aggregate amount* of punitive damages awarded against a defendant for a single course of conduct must not be "greater than reasonably necessary to punish and deter." *Haslip*, *supra* at 23. In order to ensure this result, trial judges should apply substantive standards similar to the seven standards listed in *Haslip* to determine whether an additional punitive award would exceed the aggregate amount necessary to punish and deter the defendant's conduct. Jones, 43 Ala. L. Rev. at 31.

Measured against such standards, the punitive awards assessed against petitioner in these consolidated cases cannot be sustained: To permit the continued imposition of punitive awards against a defendant which has long since *permanently* ceased to engage in the offending conduct and has paid judgments and settlements well in excess of the total profits derived from

that conduct[11] is to cover naked vengeance with the mantle of due process. When society's goals of punishment and deterrence have been satisfied, the defendant's 'guilt' has been expunged, and due process will not *tolerate* further punishment.

B. The Constitutional Concerns Implicated By Multiple Punitive Damage Awards For The Same Course Of Conduct Cannot Be Addressed Adequately At The State Level, Thus Requiring This Court's Intervention.

This Court must shoulder the responsibility for preventing repeated awards of punitive damages for the same acts or series of acts. A national solution is necessary to prevent the continued violation of the constitutional rights of corporate defendants in mass tort litigation.

The notion that this Court should provide guidance in some areas is not new, and this Court has adopted guidelines which have proven successful in bringing about order, national uniformity and fairness to out-of-state defendants in other areas of the law. The preeminent example of this is found in the area of the criminal law, where this Court has established procedural safeguards to protect the rights of the accused. *See e.g. Miranda* v. *Arizona*, 384 U.S. 436 (1966), *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), *Mapp* v. *Ohio*, 367 U.S. 643 (1961). This Court also has established national guidelines for libel and slander actions against

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[11] **In *Dunn* v. *HOVIC*, *supra* at 1397, Judge Weis noted in his dissent that compensatory awards against this petitioner have consumed all profits made by petitioner from asbestos-related products, and concluded, "In these circumstances, punitive awards are certainly not necessary to provide an effective deterrent."**

the media, *New York Times* v. *Sullivan*, 376 U.S. 25 (1964), and for the supervision of state taxation of interstate commerce, *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977).

As with the taxation of interstate commerce, unchecked punitive damage awards can lead to a "competitive race to the bottom," caused by the desire to "help your own." *Garnes* v. *Fleming Landfill, Inc.*, *supra* at 906. Moreover, individual state and federal courts hesitate to place substantive limitations on punitive damage awards when that would place their state's citizens at a competitive disadvantage with those of other states. *See e.g. Dunn* v. *HOVIC*, *supra* at 1386.[12]

Due process requires that a court consider the aggregate amount of multiple punitive damage awards against a defendant for the same course of conduct in determining the reasonableness of a punitive damage award. However, the constitutional implications of multiple punitive damage awards cannot be addressed on a state level since, without a national policy, a state which limits aggregate punitive awards cannot protect the defendant's due process rights if unlimited punitive awards are available in other jurisdictions in which the defendant is being sued. Jones, 43 Ala. L. Rev. at 32, Jeffries, 69 Va. L. Rev. at 146. Thus there exists a critical need for this Court's intervention.

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12 *See also* Jeffries, 72 Va. L. Rev. at 146, *In re School Asbestos Litig.*, *supra* at 1007, *Juzwin* v. *Amtorg Trading Corp.*, 718 F. Supp. 1233 (D.N.J. 1989).

II.

A STATE PROCEDURE WHICH REQUIRES A DEFENDANT TO SUBMIT "PUNITIVE DAMAGES OVERKILL" EVIDENCE TO THE JURY, RATHER THAN TO THE COURT AFTER VERDICT, IS FUNDAMENTALLY UNFAIR, AND DEPRIVES DEFENDANTS OF PROCEDURAL DUE PROCESS.

In this case, the issue of the due process implications of multiple punitive awards against petitioner was presented to the trial court in petitioner's post-trial motion for judgment notwithstanding the verdict. However, the trial court declined to consider the issue, finding that it had been waived because the evidence upon which petitioner relied (the McOmber Affidavit) had not been submitted to the jury during trial. The Illinois Appellate Court agreed, holding that the trial court's finding of waiver constituted "effective appellate review", and that the procedures established in *Hazelwood* v. *Ill. Cent. Gulf R.R.*, 114 Ill. App.3d 703; 450 N.E.2d 1199 (1983), for reviewing punitive damage awards were constitutionally sufficient.[13] The Illinois Supreme Court denied review.

The procedure approved by the Illinois Appellate Court in this case, which requires a defendant to pre-

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13 In *Hazelwood*, the Illinois Appellate Court set forth a three factor test for determining whether a punitive damages award is excessive: (1) the nature and enormity of the defendant's conduct, (2) the financial status of the defendant, and (3) the potential liability of the defendant. With respect to the third factor, the court noted that Comment e to Restatement, Torts, Second § 908 provides that the existence of multiple claims by numerous persons affected by the wrongdoer's conduct may affect the amount of punitive damages which is appropriate in a given case. *Id.* at 712-713. The court concluded that this factor "should be considered in any case where the defendant faces multiple liability for the same or similar wrongs." *Id.* at 714.

sent "punitive damages overkill" evidence to the jury, rather than permitting it to be submitted to the trial judge after judgment, is fundamentally unfair, and deprived defendant of due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution.

A. The Punitive Damage Procedures Developed In Traditional One-On-One Tort Suits Do Not Address The Problems Unique To Mass Tort Litigation.

In *Haslip*, this Court identified the constitutional interests which must be protected in determining the propriety of a punitive damage award: the interest in ensuring that the fact finder has "adequate guidance" in imposing the award, and the interest in ensuring that the amount of the resulting award is "reasonable." *Haslip*, *supra* at 20. These interests correspond to the interests in procedural and substantive due process.

Procedural due process, in the context of a punitive damage award, relates the requirement that the procedures employed in making the award be fundamentally fair. May, "Fashioning Procedural and Substantive Due Process Arguments in Toxic and Other Tort Actions Involving Punitive Damages After *Pacific Mutual Life Ins. Co.* v. *Haslip*," 22 Envtl. L. 573, 587-688 (1992).

Under the Due Process Clause, the government must provide fundamentally fair proceedings which guarantee each litigant "the opportunity to present his case and have its merits fairly judged." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). Due process, however, does not require the same procedural safeguards for all types of proceedings. Unlike some legal rules, due process is not a technical concept, unrelated to time,

place and circumstances. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961).

In the historic context in which punitive damages developed, most tort suits were one-against-one contests in which a single act triggered a single punishment. The recent phenomenon of mass tort litigation, resulting in unprecedented multiple punitive damage awards for a single course of conduct, demands a re-examination of the traditional procedures surrounding the imposition of such awards, in light of the peculiar circumstances presented by this modern development.

B. Requiring Defendants To Submit "Punitive Damages Overkill" Evidence To The Jury Creates A High Risk Of Prejudice And Is Fundamentally Unfair Where A Rational Alternative Exists.

In the mass tort context, a due process challenge based upon the aggregate of previous punitive awards necessarily requires the establishment at the trial court level of an evidentiary basis for the challenge. However, it is clear that evidence of prior awards imposed for the same conduct, if presented to the jury, may do a defendant more harm than good. Jones, 43 Ala. L. Rev. at 29-30.

A defendant who adduces such evidence increases the risk that the jury will find against him on the contested liability issues that are before it, and will conclude, on that basis, that additional punitive damages are appropriate. Wheeler, 69 Va. L. Rev. at 295. This dilemma has caused one court to comment, "To require a defendant to present such prejudicial evidence to a jury as its only alternative is to place it between Scylla and Charybdis." *Juzwin* v. *Amtorg Trading Co.*, 705 F. Supp. at 1056.

For these reasons, the procedure adopted by the Illinois Appellate Court in this case denies defendants procedural due process because it requires them to preserve their due process challenge to the amount of the jury's verdict by presenting to the jury highly prejudicial evidence which is not relevant to the determination of culpability and which may well influence the jury in determining the size of both its compensatory and punitive awards. Such a requirement is fundamentally unfair where there exists an alternative procedure which has been approved by this Court.

In *Haslip*, this Court sustained Alabama's common-law method of assessing and reviewing punitive damages against a due process challenge. In evaluating the Alabama common-law scheme in light of the Due Process Clause, the Court focused its attention on the post-verdict process. The Court held that Alabama's procedures for post-trial and appellate review of punitive awards, in which the trial and appellate courts apply independent substantive review criteria — *including the consideration of evidence not submitted to the jury* — provide adequate constraints to satisfy due process.

The procedure which was approved by this Court in *Haslip*, and which was followed by petitioner in this case — consisting of presenting the "punitive damages overkill" evidence to the trial judge *after* verdict — reasonably accommodates the defendant's interest in rational decision making and the state's interest in meaningful individualized assessment of appropriate deterrence and retribution, *Haslip*, *supra* at 21. The Illinois procedure adopted in this case, however, forces a defendant to preserve its constitutional right to be protected against excessive punitive awards at its peril, since the procedure for doing so carries a substantial

risk of exposing the defendant to even larger awards, based upon the detailed knowledge acquired by the jury of past juries' assessments of the enormity of the defendant's conduct.

CONCLUSION

The serial award of punitive damages in mass tort litigation is a pressing national concern which urgently requires this Court's intervention to bring about order, uniformity and fairness. Nowhere is this need more critical than in asbestos litigation, where the bankruptcy of more than half of the original major asbestos defendants itself constitutes convincing proof that continuing awards constitute overkill.[14] As has been frequently noted, "The purpose of punitive damages is to sting, not kill, a defendant."[15]

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14 As of July, 1991, at least nineteen former manufacturers of asbestos products had filed for bankruptcy. These include Johns-Manville, Raymark Industries, Eagle-Picher Industries, H. K. Porter, Celotex, Carey Canada, Forty-Eight Insulations, UNARCO, Nicolet, Amatex, Huxley, Pacor, Standard Asbestos, D.I. Distributors, *see* Schuck, "The Worst Should Go First: Deferral Registries in Asbestos Litigation," 15 Harv. J. L. & Pub. Pol. 541, 555 n. 56 (1992), National Gypsum, UNR Industries (the parent of UNARCO), North American Asbestos, Brunswick Fabricators, and Hillsborough, *see* Edley & Weiler, 30 Harv. J. Legis. at 390 n. 13. At least one additional manufacturer, Keene Corporation, has filed bankruptcy since then. *See*, "Keene Corp. Asbestos Battle," *Wall Street Journal*, Dec. 6, 1993, p. B10.

15 *In re N.D. Cal. "Dalkon Shield" IUD Prod. Liab. Litig.*, 526 F.2d 887, 899 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cited in* Jones, 43 Ala. L. Rev. at 23.

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Appellate Court of Illinois, Fifth District.

Respectfully submitted,

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Dated: January 7, 1994

APPENDIX TO PETITION FOR CERTIORARI

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UNITED STATES CONSTITUTION, AMENDMENT XIV, SEC. 1

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law. . . .

-DECISION SOUGHT TO BE REVIEWED-

OPINION
610 N.E.2D 683 (ILL.APP. 5 DIST. 1993)

242 Ill.App.3d 781; 182 Ill.Dec. 814
(State of Illinois — Appellate Court — Fifth District)

(February 23, 1993)

(John KOCHAN, Plaintiff-Appellee, v. OWENS-CORNING FIBERGLASS [*sic* throughout] CORPORATION, Defendant-Appellant; Clarence GRANGER and Hilma Granger, Plaintiffs-Appellees, v. OWENS-CORNING FIBERGLASS CORPORATION, Defendant-Appellant; Herman DAVIS and Elizabeth Davis, Plaintiffs-Appellees, v. OWENS-CORNING FIBERGLASS CORPORATION, Defendant-Appellant; Harry RENEAU and Arvada Reneau, Plaintiffs-Appellees, v. OWENS-CORNING FIBERGLASS CORPORATION, Defendant-Appellant; Clarence WOODWARD and Ursel Woodward, Plaintiffs-Appellees, v. OWENS-CORNING FIBERGLASS CORPORATION, Defendant-Appellant — No. 5-91-0191)

Justice WILLIAM A. LEWIS delivered the opinion of the court:

These five first-named plaintiffs (and the wives of four of them) and four others brought actions against defendant, Owens-Corning Fiberglass (OCF), and several other defendants to recover damages for personal injury resulting from plaintiffs' exposure to asbestos-containing products. All defendants, except OCF, settled with plaintiffs just after the trial began. The jury returned verdicts in favor of plaintiffs named in this appeal and against the other four. Defendant appealed.

Defendant makes 10 arguments on appeal: (1) the trial court erred by precluding defendant from introducing evidence that plaintiffs were exposed to asbestos-

containing products manufactured by other companies not present at trial; (2) the trial court erred by denying its motion for change of venue; (3) the trial court erred in submitting the issue of punitive damages to the jury; (4) the punitive damage awards were excessive; (5) the punitive damage awards violated defendant's procedural and substantive due process rights; (6) the trial court erred by allowing plaintiffs' expert to read into evidence the underlying data and information on which he based his opinion; (7) the trial court erred in permitting plaintiffs' counsel to read into evidence only a portion of an answer given by Herman Davis at his deposition; (8) the trial court erred by admitting an exhibit which referred to a prior unrelated settlement; (9) plaintiffs Reneau, Granger and Davis failed to offer sufficient evidence to allow recovery for fear of cancer, and (10) the judgment should be reduced to reflect the amount of settlements paid by settling defendants. We affirm in part and remand in part.

OCF bought the Kaylo Division of Owens-Illinois Glass Company in 1958 and began manufacturing Kaylo, an industrial heat-insulation product. Asbestos made up 15% of the contents of Kaylo. Defendant maintained that it began putting warning labels on Kaylo in 1966, after the development of information that asbestos might pose risks to end-users of products containing small percentages of asbestos. Defendant ceased making Kaylo in 1972.

Plaintiffs presented evidence that defendant had information regarding the dangers of asbestos through the 1940's and 1950's and knew by 1963 that it was dangerous to a person's health. (It is not clear from the evidence why defendant received this information as to the dangers of asbestos in the 1940's and 1950's prior to its purchase of the Kaylo Division in 1958, but there was

no dispute that defendant had such information.) Plaintiffs also presented evidence that defendant did not begin putting warning labels on Kaylo until 1970.

Four of the five plaintiffs were exposed to Kaylo while working at the Standard Oil/Amoco plant in Wood River, Illinois. One plaintiff was exposed to Kaylo at the General Steel plant in Granite City, Illinois.

Clarence Granger worked at the Amoco plant from 1942 to 1974 as a laborer and then as an insulator removing and replacing pipe covering and insulation. He testified that he worked with Kaylo many times from the 1940's through the 1970's. He cut Kaylo a lot of times, and it was dusty when he sawed it. He never saw warnings on Kaylo indicating that it was dangerous to his health or that he should take precautions when using it.

John Kochan worked a variety of jobs at Amoco between 1945 and 1981, and he worked around Kaylo on frequent basis in the 1960's. He cleaned up asbestos when he was a laborer. When he worked as a machinist, he sometimes worked on a pump while the insulators were covering a new line overhead. As the insulators cut the insulation, dust came down so thickly that it looked like snow, causing Kochan to don goggles to keep it out of his eyes. He also delivered Kaylo as a truck driver. He never saw any warnings on Kaylo.

Harry Reneau worked at Amoco from 1945 to 1982 primarily as a welder, but briefly as a laborer and a pipefitter's helper. As a welder, he removed insulation from pipes many times. He also worked around insulators who were cutting and putting on insulation. He saw many boxes of Kaylo at the plant adding that it was "the largest supplier * * * in the refinery."

Herman Davis worked at Amoco as a crane operator from 1944 through 1984. He worked around insulators

who used Kaylo. Dust would fly everywhere when the insulators cut the pipe covering. In the summer months, the fan in the cab of the crane would suck the dust through the cab in such a volume that he was covered. During the early 1960's through the late 1970's, he used the bucket of the crane to remove insulation. Dust would also blow all over him when he cleaned out the ash pits that were filled with insulation. He testified that he worked around Kaylo all the years he was at the plant. He even recalled seeing boxes of Kaylo in the plant as late as 1983. There were no warnings on the boxes at any time indicating that they contained asbestos.

Clarence Woodward was exposed to Kaylo while working at the General Steel Plant in Granite City, Illinois, from 1941 through 1971. As a laborer, he cleaned up after the insulators, picking up asbestos or whatever was on the floor. Although he could not personally identify the brand names of the insulation materials, a coworker, Victor Welch, testified that he worked with Kaylo around Woodward in the 1960's, that Kaylo was all over the General Steel plant, and that Kaylo was used in 10 of the buildings where Woodward worked. Kaylo was the insulation used the most by insulators at General Steel.

Asbestosis, a type of pneumoconiosis, which is a lung condition resulting from inhalation of certain dusts, is caused by inhalation of asbestos dust. Inhaled asbestos particles are deposited in the lung tissue, and with sufficient exposure, and after an extended latency period, the asbestos particles may result in scarring and possible impairment in the functioning of the lung. Asbestosis is progressive and incurable.

Plaintiffs' experts testified that the development of an asbestos-related condition is a cumulative process and

that each dose contributes to the risk of asbestosis. Dr. Miles Yanta testified that each exposure to asbestos was a substantial contributing factor in causing asbestosis. He also acknowledged on cross-examination that there must also be a certain amount of exposure before a person will contract asbestosis, but he did not know what that threshold exposure was.

Both parties presented expert medical testimony regarding the medical condition of each plaintiff. Although defendant offered contradictory testimony, each plaintiff presented testimony that he suffered from asbestosis. Defendant does not raise any issue regarding the injuries suffered; therefore, we will discuss only that portion of the extensive medical testimony necessary to resolve the issues presented.

Plaintiffs offered evidence of defendant's knowledge that its asbestos-containing products were potentially hazardous to end-users. Over defendant's objection, Dr. Joseph Wagoner, an epidemiologist, testified that it was established that exposure to asbestos was linked to asbestosis by 1930 and linked to cancer by 1955. Dr. Wagoner cited various articles and was allowed to testify as to the substance of each article. He also testified to several other articles which shouid have put defendant on notice of the hazards of asbestos. Plaintiffs also presented several intraoffice memoranda, which we will summarize later in the opinion, which indicated that defendant became aware of the dangers of asbestos in the 1940's.

The jury returned verdicts for these five plaintiffs, awarding $1 million in punitive damages to each of them, plus damages for disability and past and future pain and suffering.

I.
EVIDENCE OF OTHER MANUFACTURERS' ASBESTOS PRODUCTS

Defendant argues that the trial court erred in excluding evidence that plaintiffs had been exposed to other asbestos-containing products manufactured or distributed by companies other than OCF. We disagree.

In 1986, there were thousands of asbestos cases filed in Madison County, to which Judge Chapman was assigned to oversee. Judge Chapman entered a blanket order in 1988 ruling on various motions *in limine*. Relying on *Lipke* v. *Celotex Corp.* (1987), 153 Ill.App.3d 498, 106 Ill.Dec. 422, 505 N.E.2d 1213, *appeal dismissed* (1989), ___ Ill.2d ___, 129 Ill.Dec. 387, 536 N.E.2d 71, he granted the plaintiffs' motion *in limine* to exclude any evidence that plaintiffs had been exposed to asbestos-containing products manufactured by other parties not parties to the case at the time of the trial. The trial judge in this case also relied on *Lipke* in denying defendant's motion to reconsider Judge Chapman's ruling. Defendant claims that the court's reliance on *Lipke* was error.

In *Lipke*, an asbestos case, the defendant denied that the plaintiff was exposed to its product. One of the defendant's arguments on appeal was that the trial court wrongfully excluded evidence of plaintiff's exposure to other asbestos products. That court noted that there can be more than one proximate cause of an injury and stated:

> "'In such a situation, one guilty of negligence cannot avoid responsibility merely because another person is guilty of negligence contributing to the same injury * * *.' (*Sears* v. *Kois Brothers Equip-*

> *ment, Inc.* (1982), 110 Ill.App.3d 884, 889, 66 Ill.Dec. 531, 443 N.E.2d 214, *appeal denied* (1982), 93 Ill.2d 548.) Under *Romine* v. *City of Watseka* (1950), 341 Ill. App. 370, 377, 91 N.E.2d 76, where such guilt exists, 'it is no defense that some other person or thing contributed to bringing about the result for which damages were claimed. Either or both parties are liable for all damages sustained.' Thus, the fact that plaintiff used a variety of asbestos products does not relieve defendant of liability for his injuries. Evidence of such exposure is not relevant." *Lipke*, 153 Ill.App.3d at 509, 106 Ill.Dec. at 443, 505 N.E.2d at 1221.

Defendant asserts that there are two elements to proximate cause; actual cause, or cause in fact, and legal cause. Cause in fact is determined by simply analyzing the facts. Two tests are used when considering cause in fact: the "but for" test, where a defendant's conduct is not a cause if the event would have occurred without it; and the "substantial factor" test, in which as defendant's conduct is a cause "if it was a material element and a substantial factor in bringing the event about." (*Thacker* v *UNR Industries, Inc.* (1992), 151 Ill.2d 343, 354-55, 177 Ill.Dec. 379, 385, 603 N.E.2d 449-455.) Once it is found that defendant's conduct was a cause in fact of the injury, the next question is whether defendant's conduct was the legal cause; i.e., whether the defendant should be held legally responsible for the actual consequences for his conduct. *Turner* v. *Roesner* (1990), 193 Ill.App.3d 482, 490, 140 Ill.Dec. 415, 420-21 549 N.E.2d 1287, 1292-93, *appeal denied* (1990), 132 Ill.2d 555, 144 Ill.Dec. 267, 555 N.E.2d 386.

Defendant argues that its conduct was not a cause in fact of plaintiffs' injuries and asserts that the evidence of other exposures to other products was necessary and should have been admitted because the jury could not make the initial determination of cause in fact unless it knew of all other exposures. Defendant's position is that *Lipke* does not apply to exclude evidence of exposures to other manufacturer's products when cause in fact is disputed, but rather, it applies only to the second prong of proximate cause, legal cause.

Although it appears that the defendant in *Lipke* was arguing that it was not a cause of the injury, the court's holding appears to pertain to cases in which cause in fact has already been proven; that where it has already been proven that one defendant is a cause in fact, that defendant cannot introduce evidence of another's negligence in order to relieve it of legal cause and thus liability. We, nevertheless, conclude that the holding in *Lipke*, that evidence of exposure to other asbestos-containing products is not relevant, applies in cases which actual cause or cause in fact is disputed.

Our courts recognize that it is impossible to determine whether a specific exposure or even several exposures to a particular asbestos product caused or contributed to the cause of the injury. On the other hand, it is equally impossible to find that a specified exposure or several exposures did not cause or contribute to the injury. Proof of causation is further complicated by the extended time period of more than 25 years for the asbestos injury to manifest itself.

Because of these difficulties in proof of causation in asbestos cases, our supreme court adopted the "frequency, regularity and proximity" test, which has been characterized as the "*de minimus*" rule. *Thacker*, 151 Ill.2d at 358-59, 177 Ill.Dec. at 387, 603 N.E.2d at 457.

Allowing a defendant to present evidence of a plaintiff's exposures to other products whose manufacturers are not defendants in the trial would only confuse the jury, with a possible result that a defendant could be unjustly relieved of liability. The purpose for which the evidence is offered is inconsequential, for the effect is the same: the shift of blame to another manufacturer.

On the other hand, a plaintiff might incur a risk by not introducing the evidence of other exposures, because, if the evidence shows only a minimal exposure to defendant's product and no other exposure to asbestos, plaintiff's expert may look foolish testifying that such minimal exposure caused a pneumoconiosis that must have been caused by asbestos. Plaintiff would also be subject to the "*de minimus*" rule, which may result in a directed verdict against him. If plaintiff attempts to bolster his or her expert's opinion by showing plaintiff's exposure to other manufacturers' products and arguing the cumulative effects of asbestos exposure, then plaintiff would be opening the door to defendant's argument that it was plaintiff's exposure to other products that caused plaintiff's injury.

Defendant could have negated liability without introducing evidence of exposure to other asbestos products simply by showing, for example, that plaintiff was not exposed to its products, that exposure to its products was insufficient to cause injury, or that its product contained such a low amount of asbestos that it could not have been cause of the injury. The question for the jury to consider, with or without evidence of exposures to other products, is the same: whether the evidence against the particular defendant at trial was sufficient to find that particular defendant's product was an actual cause or cause in fact of plaintiff's injury.

Plaintiff's burden was to show that defendant's conduct was a substantial factor in causing the alleged injury. (*Thacker* v. *UNR Industries, Inc.* (1992), 151 Ill.2d 343, 177 Ill.Dec. 379, 603 N.E.2d 449; *Wehmeier* v. *UNR Industries, Inc.* (1991), 213 Ill.App.3d 6, 157 Ill.Dec. 251, 572 N.E.2d 320.) In the case at hand, after reviewing all the evidence, we conclude there was sufficient evidence for the jury to reasonably find this defendant liable. Each of the plaintiffs suffer from asbestosis. Dr. Yanta testified that each exposure to asbestos was a substantial factor in causing the asbestosis. There was testimony that Kaylo was used more than any other product and not only frequently but almost daily at Amoco and General Steel, and that each plaintiff worked with or was in close proximity to Kaylo on a regular basis for several years. We do not have to be concerned about the "*de minimus*" rule or the fiberdrift question present in the *Thacker* case, as there was substantial evidence showing that plaintiffs were frequently, regularly, and proximately exposed to Kaylo. (*Thacker* v. *UNR Industries, Inc.* (1992), 151 Ill.2d 343, 177 Ill.Dec. 379, 603 N.E.2d 449.) Once the plaintiffs established that defendant's product was a substantial factor in causing their injuries, the allowance of evidence of plaintiffs' exposures to products manufactured by nonparties would have improperly allowed defendant to attempt to shift the blame of its negligence to another party or to create confusion in the jurors' minds.

Finally, we note that recently the United States Court of Appeals, Seventh Circuit, in *Tragarz* v. *Keene Corp.*, (7th Cir.1992), 980 F.2d 411, agreed with our interpretation of *Lipke* that evidence of exposures of plaintiff to other manufacturer's products are not relevant in determining whether exposure to defendant's product was a substantial factor in causing plaintiff's injury.

II.
CHANGE OF VENUE

Defendant argues that the trial court erred by denying its "motion for change of judge" pursuant to section 2-1001(a)(2) of the Code of Civil Procedure. (Ill.Rev.Stat.1989, ch. 110, par. 2-1001(a)(2).) Under that statute, if a motion is timely and in proper form, the right to change of venue is absolute and the trial court has no discretion to deny the motion. (*Rosewood Corp.* v. *Transamerica Insurance Co.* (1974), 57 Ill.2d 247, 311 N.E.2d 673.) A motion is untimely if it is brought after a hearing on the merits has started or the trial court has ruled on a substantive issue in the case. (*Frede* v. *McDaniels* (1976), 37 Ill.App.3d 1053, 347 N.E.2d 259.) "The timeliness requirement prevents a party from determining the trial court's attitude toward issues in the case, then switching judges." *Heman* v. *Jefferson* (1985), 136 Ill.App.3d 745, 751, 91 Ill.Dec.191, 196, 483 N.E.2d 537, 542.

As we mentioned previously, there were thousands of asbestos cases filed in Madison County. All of the plaintiffs in these cases were represented by four separate law firms. Judge Riley, assigned to help manage all these cases, entered a standing order which standardized pleading, regulated discovery, and set forth standards for nonexpert and expert disclosures in all asbestos litigation.

The trial judge in this case, Judge Maag, was assigned to assist Judge Riley on April 7, 1989. He assisted Judge Riley in hearings on proposed changes in the standing order and participated in the decision on a supplement to the standing order, which limited the parties in redeposing co-workers who had been deposed as plaintiffs in other asbestos cases.

On August 30, 1989, W. R. Grace and Company, another defendant, filed a motion for clarification and sanctions in all pending asbestos cases in which plaintiffs were represented by Baron and Budd, the plaintiffs' attorneys in this case. Judge Maag ruled on this motion on January 3, 1990.

On January 4, 1990, defendant filed its motion for change of judge from Judge Maag "in all Madison County Illinois asbestos cases in which [OCF] is a defendant." The motion applied to "all asbestos litigation filed by Baron and Budd." Judge Maag denied the motion because he had previously ruled on the motion for clarification and sanctions, which he considered a substantive issue in all cases to which the motion applied.

Defendant raised the issue again in its post-trial motion. The trial judge denied the motion, citing his participation in rulings on the standing order and its supplements and various other issues in other asbestos cases pending in Madison County.

Defendant claims that the motion for clarification and for sanctions pertained only to discovery and the ruling on that motion did not require the court to consider, evaluate or weigh any substantive issues of these lawsuits. Defendant cites *Becker* v. *R. E. Cooper Corp.* (1990), 193 Ill.App.3d 459, 140 Ill.Dec. 600, 550 N.E.2d 236, *Stoller* v. *Paul Revere Life Insurance Co.* (1987), 163 Ill.App.3d 438, 115 Ill.Dec. 40, 517 N.E.2d 5, and *In re Marriage of Birt* (1987), 157, Ill.App.3d 363, 109 Ill.Dec. 691, 510 N.E.2d 559, *appeal denied* (1987), 116 Ill.2d 556, 113 Ill.Dec. 292, 515 N.E.2d 101, in support of its argument. These three cases are distinguishable from the case at hand because: in *Backer*, the trial judge only presided over a pretrial conference in which no ruling was made; in *Stoller*, the trial judge made general discovery rulings,

set dates for interrogatories and the trial, and required submission of a witness list; and in *Birt*, the judge was sitting in on motions for another judge who was assigned to hear the case and he merely limited discovery by nonparties to the action.

In the case at hand, however, the trial judge's ruling on the motion for clarification and for sanctions was a ruling on a substantive issue, and defendant was not entitled to a change of judge under section 2-1001. This ruling entailed more than mere administrative or ministerial discovery rulings. Judge Maag's ruling pertained to evidentiary matters, inducing the questions a defendant could ask a plaintiff co-worker as to what products a plaintiff worked with and what impeachment defendant would be allowed at trial by use of the depositions, and he ordered parties to allow a witness to answer questions subject to objection. Thus, the trial judge limited the scope of inquiry and possible impeachment of plaintiff co-workers at the trial with respect to product identification, and he made known his interpretation of Supreme Court Rule 212(c) (134 Ill.2d R. 212(c)), involving the partial use of depositions for impeachment at the trial.

Furthermore, in light of the above, we believe that the judge's ruling on the motion for sanctions against Baron and Budd was a substantive ruling. See *Perimeter Exhibits, Ltd.* v. *Glenbard Molded Binder, Inc.* (1984), 122 Ill.App.3d 504, 77 Ill.Dec. 657, 461 N.E.2d 44; *Dolido* v. *Zenith Radio Corp.* (1990), 194 Ill.App.3d 268, 141 Ill.Dec. 179, 550 N.E.2d 1225.

Since we find that the above were rulings on substantive issues, we need not consider whether the trial judge's participation in the ruling regarding the supplement to the standing order was a substantive issue.

III
PUNITIVE DAMAGES

The jury awarded $1 million in punitive damages to each of the five plaintiffs. Defendant raises several issues regarding those punitive damages.

A. *Insufficient Evidence*

Defendant argues that the trial court erred in submitting the issue of punitive damages to the jury because each plaintiff failed to establish the elements necessary for an award of punitive damages.

Punitive damages can be awarded when the tort was "committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully or with a such gross negligence as to indicate a wanton disregard for the rights of others". *Kelsay* v. *Motorola, Inc.* (1978), 74 Ill.2d 172, 186, 23 Ill.Dec. 559, 565, 384, N.E.2d 353, 359.

Defendant argues that the punitive damage awards should be vacated because there was no evidence that defendant acted with outrageous, willful or wanton conduct in not warning plaintiffs of the danger of asbestos when it marketed Kaylo. Defendant asserts that plaintiffs' evidence established only that defendant was generally aware of developing medical literature that asbestos could cause health problems and did not establish that defendant had knowledge of health hazards associated with end-users or bystanders. We disagree.

Medical literature existed, as early as 1899, concerning the hazards of asbestos. Defendant was a subscriber to many journals which contained articles on the dangers of asbestos. Several office memoranda (portions of which are set out below) indicated that defendant began compiling information on the hazards of asbestos as early as the 1940's and 1950's.

Memoranda introduced indicated that in 1940 defendant was encountering difficulty marketing its fiberglass insulation products because the insulation workers' union feared that fiberglass might be hazardous. Those documents, while highlighting the positive aspects of fiberglass, indicated defendant's awareness of the hazards of asbestos.

Memo dated January 30, 1940:

> "some of these other materials are known to develop industrial diseases that we do not find present in the handling of fiberglass (such as asbestosis and possibly silicosis). Most of these other products are very dusty compared to fiberglass."

Memo dated January 20, 1941:

> "Thanks so much for your letter of January 17. It is indeed good news to hear that you do not feel you will encounter any evidence of an asbestos-like reaction since none of the fiber reaches the lungs."

Memo dated May 15, 1941:

> "I feel quite positive that we are not going to encounter any evidence of an asbestos-like reaction because none of the fiber reaches the interior of the lungs."

In order to combat the union's fear that fiberglass was harmful and to successfully market their product, defendant intended to publicize the hazards associated with asbestos:

Memo dated January 7, 1942:

> "Gather as a weapon-in-reserve an impressive file of photostats of medical literature on asbestosis.

> Available are two bibliographies covering medical literature to 1938, citing reference to scores of publications in which the lung and skin hazards of asbestos are discussed. This file would cover five or six hundred pages * * * ;
>
> If the reaction is unfavorable, use the asbestosis weapon in reserve to let them stew. * * * ."

Another memorandum, dated February 6, 1956, and directed to the director of personnel and industrial relations of OCF, pertained to medical studies performed to determine the safety of fiberglass and stated:

> "I suppose you already know that asbestos is fairly well incriminated as a carcinogen and the asbestos causes lung damage by virtue of the length of its fibers * * *."

A letter dated February 8, 1956, which enclosed the above letter of February 6, stated:

> "This is certainly not what I had in mind when I asked Dr. Schepers to give us a letter incorporating favorable statements based upon past experiments with Fiberglass in the laboratory. I personally do not like the general tenor of this letter. It is certainly nothing that we could show our customers or a union."

A memorandum dated September 17, 1963, having as its subject, "HEALTH HAZARD, KAYLO V. GPL-400", stated expressly that:

> "Asbestos (as found in Kaylo) when breathed into the lungs causes asbestosis which often leads to lung cancer."

In the above paragraph, the author went on to say that he had read three medical articles on the subject, and he noted North Carolina's requirement that all persons

working with asbestos receive Xray examinations. The memo continued:

> "Based on presently available data, GPL-400 is not as detrimental to the health as Kaylo."

In 1965, a memo suggested that a warning be put on Kaylo:

> "I have been receiving inquiries from various sources about the health hazards of our Kaylo products and I assume this will continue. * * *
>
> The reason for this memo is that I believe you should be informed about the status of the situation and that we should continue to give serious consideration to the labeling of our Kaylo in a manner similar to that currently being used by Johns-Manville. * * *
>
> I do not know how many states will allow suit to be brought against negligent manufacturers * * * ."

Another memo regarding the possibility of a warning label on Kaylo was written on September 21, 1970:

> "Reference is made to your memo of September 15 regarding the warning label that should appear on Kaylo. Are you saying that we have to do this now? I naturally would like to delay this requirement as long as possible."

Viewing this evidence in the light most favorable to the plaintiffs (*Loitz* v. *Remington Arms Co.* (1990) 138 Ill.2d 404, 426, 150 Ill.Dec. 510, 520, 563 N.E.2d 397, 407, citing *Pedrick* v. *Peoria & Eastern R.R. Co.* (1967), 37 Ill.2d 494, 229 N.E.2d 504), we believe this evidence was sufficient to warrant punitive damages. The evidence showed that defendant was aware of the hazards of asbestos, chose not to disclose the information, and

failed to place warning labels on the product at the time it knew of the hazards of the product. In fact, defendant apparently chose to stockpile the information in the event that it could be beneficial in marketing other products. It is also evident that defendant continued to hesitate to place warning labels on the products as late as 1970, even after they became aware of the possibility of lawsuits. This conduct clearly amounts to an utter indifference to, or conscious disregard for the safety of others.

Defendant, relying on *Kemner* v. *Monsanto Co.* (1991), 217 Ill.App.3d 188, 160 Ill.Dec. 192, 576 N.E.2d 1146, also argues that plaintiffs failed to make a submissible case for punitive damages because there was no evidence of any corporate complicity by defendant. Under the corporate complicity rule, punitive damages can be assessed against a corporation only "if a superior officer of the corporation ordered, participated in, or ratified the 'outrageous conduct' of the employee. (*Kemner*, 217 Ill.App.3d at 205, 160 Ill.Dec. at 203, 576 N.E.2d at 1157, citing *Pendowski* v. *Patent Scaffolding Co.* (1980), 89 Ill.App.3d 484, 44 Ill.Dec. 544, 411 N.E.2d 910.) A plaintiff is required to establish that there was "deliberate corporate participation by and through its officers and directors." (*Kemner*, 217 Ill.App.3d at 207, 160 Ill.Dec. at 204, 576 N.E.2d at 1158). Defendant argues that plaintiffs failed to show corporate complicity because there was no evidence that defendant's corporate management knew of the risk or dangers of asbestos or acted willfully or wantonly. Defendant acknowledges the above memoranda, but asserts there was no showing of the responsibilities or authority of the authors of the memos.

In both *Kemner* and *Pendowski*, the issue was whether it was error of the trial court to refuse to instruct the jury on corporate complicity. In each of those cases,

the trial court failed to give an instruction on complicity but instead gave the same instruction that was given in the case at hand: "The defendant is a corporation and can act only through its officers and employees. Any act or omission of an officer or employee within the scope of employment is the action or omission of the defendant corporation." (Illinois Pattern Jury Instructions, Civil, No. 50.11 (2d ed. 1971).) Under this instruction, a corporation is liable for any act of an employee, rather than those only ordered, participated in, or ratified by a superior officer. Thus, under this instruction, no corporate complicity is required.

In the case at hand, however, defendant has waived any argument regarding the lack of corporate complicity. Defendant failed to object to this instruction and did not tender a proposed instruction of his own. Therefore, the issue is waived. *Deal* v. *Byford* (1989), 127 Ill.2d 192, 130 Ill.Dec. 200, 537 N.E.2d 267.

Furthermore, even had a corporate complicity instruction been given, there was sufficient evidence to infer corporate complicity. Defendant does not dispute the authenticity of the documents. Most of the documents are on defendant's company letterhead and are entitled, "intra-office correspondence." At least two of the memos make reference to the company president, and one was written to the director of personnel and industrial relations. Furthermore, there were several letters, each pertaining to marketing, company policies, and business, which indicate that the memos were written by persons with authority within the corporation. We do not believe it is necessary that there be direct proof, such as in the form of a superior officer's signature, to show corporate complicity. It can be reasonably inferred from the evidence presented that there

was deliberate corporate participation. *Kemner* v. *Monsanto Co.* (1991), 217 Ill.App.3d 188, 160 Ill.Dec. 192, 576 N.E.2d 1146.

B. *Excessiveness*

Defendant argues next that the five punitive damage awards, totaling $5 million are excessive. Defendant asserts that there are three factors, not properly considered here, which should be considered in determining whether a punitive damages award is excessive: (1) the enormity of the wrong; (2) the financial status of the defendant; and (3) the potential liability of the defendant. (*Hazelwood* v. *Illinois Central Gulf R.R.* (1983), 114 Ill.App.3d 703, 71 Ill.Dec. 320, 450 N.E.2d 1199; *Deal* v. *Byford* (1989), 127 Ill.2d.192, 130 Ill.Dec. 200, 537 N.E.2d 267.)) Defendant argues that based on these factors, the awards are excessive.

In Illinois, the nature of punitive damages is punishment for the defendant, and "that punishment is designed to promote three purposes: (1) to act as retribution against the defendant; (2) to deter the defendant from committing similar wrongs in the future; and (3) to deter others from similar conduct." (*Hazelwood*, 114 Ill.App.3d at 712, 71 Ill.Dec, at 208, 450 N.E.2d at 1207.) An award of punitive damages will not be disturbed on appeal as being excessive unless it is the result of passion, partiality, or corruption. *Deal* v. *Byford* (1989), 127 Ill.2d 192, 130 Ill.Dec. 200, 537 N.E.2d 267.

Defendant first argues that its conduct was not so egregious as to justify the award. We disagree.

As we previously indicated, the evidence showed that defendant was aware of the dangers of asbestos and, in fact, planned to use that information in marketing another product. The intraoffice memos also indicated a deliberate failure to warn. Asbestosis is a horrible dis-

ease that generally results in a painful and prolonged death. Surely defendant cannot be serious when it maintains that willfully exposing and causing this horrible disease for five persons is not an enormous wrong.

We also disagree with defendant's assertion that plaintiffs' failure to introduce evidence of defendant's financial status requires an automatic remittitur of the awards. (*Black* v. *Iovino* (1991), 219 Ill.App.3d 378, 162 Ill.Dec. 513, 580 N.E.2d 139, *appeal denied* (1992), 143 Ill.2d 636, 167 Ill.Dec. 396, 587 N.E.2d 1011.) We decline to follow *Black* and rely on the ruling of our supreme court in *Deal* v. *Byford* (1989), 127 Ill.2d 192, 130 Ill.Dec. 200, 537 N.E.2d 267, that plaintiffs were not required to introduce evidence of defendant's financial status in order to recover punitive damages. Defendant did not offer evidence of its financial status, and it cannot now complain of its absence. *Deal* v. *Byford* (1989), 127 Ill.2d 192, 130 Ill.Dec. 200, 537 N.E.2d 267; see also *Ekl* v. *Knecht* (1991), 223 Ill.App.3d 234, 165 Ill.Dec. 760, 585 N.E.2d 156; *Verdonck* v. *Scopes* (1992), 226 Ill.App.3d 484, 168 Ill.Dec. 908, 590 N.E.2d 545.

We next consider defendant's potential liability. In support of its post-trial motion, defendant filed the affidavit of Robert McComber, an attorney for defendant responsible for maintaining records regarding the status of asbestos litigation pending against it. According to his affidavit as of November 30, 1990, there were almost 85,000 cases pending against defendant with new cases being filed at a rate of almost 2,000 a month. The affidavit also listed several previous judgments against defendant of huge amounts, but the affidavit fails to tell if defendant paid such judgments.

There is no doubt that defendant's potential liability is great. It does not take a mathematical genius to figure out that if defendant has 85,000 suits filed against it and

it loses 10% of the suits with punitive damages awarded in the sum of $1 million, defendant's potential liability would be $8.5 billion for punitive damages alone. This evidence and reasoning, however, was not presented to the jury.

The basic problem with defendant's argument is that the jury was not given any of the information that defendant now wants us to consider, because the defendant elected not to submit the information to the jury. We have held before that "[t]he jury, with its unique ability to articulate community values, should decide whether punitive damages should be imposed." (*Knecht* v. *Radiac Abrasives, Inc.* (1991), 219 Ill.App.3d 979, 984, 162 Ill.Dec. 434, 434, 579 N.E.2d 1248, 1251, *appeal denied* (1992), 143 Ill.2d 639, 167 Ill.Dec. 401, 587 N.E.2d 1016.) Defendant is now asking us to reverse a jury verdict simply because $5 million is a lot of money. This court, however, does not possess a better ability to articulate community values that the 12 jurors in this case.

Further, plaintiffs cannot cross-examine an affidavit, nor were plaintiffs given the opportunity to contest the allegations in the affidavit. We do not know, therefore, if there are 85,000 suits similar to this case pending against defendant, whether defendant has any insurance to cover the judgments, what percentage of the suits will most likely result in judgements against the defendant (we note that the jury found against four plaintiffs in this case), whether structured settlements can be reached in many cases, whether defendant is a million-dollar company or a 10-billion-dollar company, and whether juries will award such punitive damages if they are made aware that there may not be any money left for actual damages for the thousands of plaintiffs whose cases have not been tried. While potential liability is a factor to be considered, since defendants failed to

timely submit the evidence of potential liability we cannot now consider the evidence on review.

C. *Constitutional*

Defendant's next argument regarding punitive damages is that the awards violated defendant's procedural and substantive due process rights under the due process clause of the fourteenth amendment and article I, section 2, of the Illinois Constitution. Defendant cites *Pacific Mutual Life Insurance Co.* v. *Haslip* (1991), 499 U.S. 1, 111 S. Ct. 1032, 113 L.Ed.2d 1 for the proposition that there are procedural and substantive due process guidelines to insure that punitive damage awards are fair, which are not present here.

In *Haslip,* in deciding that the punitive damages in an Alabama case did not violate the due process clause of the fourteenth amendment, the Supreme Court noted that there was no "mathematical bright line between the constitutionally acceptable and constitutionally unacceptable * * * " (*Haslip*, 499 U.S. at ___, 111 S Ct. at 1043, 113 L.Ed:2d at 20.) The court then considered the instructions given to the jury and Alabama's post-trial and appellate review. In light of *Haslip,* we will consider the same.

1. Instructions

Defendant alleges that the jury instructions violated defendant's procedural due process rights because the jury was permitted to exercise "unbridled discretion" in awarding the punitive damages. We disagree.

We first note that defendant has waived any objection to the jury instructions because it did not tender its own version of instructions. (*Deal v. Byford* (1989), 127 Ill.2d 192, 130 Ill.Dec. 200, 537 N.E.2d 267.) Nevertheless, we will address the constitutionality of the jury instruc-

tions. These instructions defined "willful and wanton" and instructed on punitive damages, stating:

> "*If you find* that defendant's conduct was *wilful* and *wanton* and proximately caused injury to the plaintiff, and *if you believe* that *justice* and the *public good require it,* you may * * * award an amount which will serve to *punish the defendant and to deter others* from the commission of like offenses." (Emphasis added.)

We do not believe these jury instructions gave the jury such "unbridled discretion" that they were unconstitutional. The instructions indicated to the jury that punitive damages were not mandatory, that willful and wanton conduct was required, and they were only to be awarded if the "public good require[d] it." It also identified the purpose and policy of punitive damages in Illinois: to "punish" and to "deter." (*Kelsay* v. *Motorola, Inc.* (1978), 74 Ill.2d 172, 23 Ill.Dec. 559, 384 N.E.2d 353.) These instructions conformed with those under Illinois law. (Illinois Pattern Jury Instructions, Civil, Nos. 14.01, 35.01 (3d ed. 1989).) We find that the discretion exercised here was within reasonable constraints and due process was satisfied. *Haslip*, 499 U.S. at ___, 111 S. Ct. at 1044, 113 L.Ed.2d at 21.

2. Post-Trial and Appellate Review

Defendant claims that Illinois standards for post-trial and appellate review do not provide a sufficiently meaningful constraint on the jury. Defendant specifically refers to the trial court's lack of discussion on punitive damages in denying its post-trial motion as demonstrating the lack of meaningful standards.

We find, however, that post-trial and appellate review in Illinois does provide a sufficiently meaningful constraint on the jury. In denying defendant's post-trial

motion, the trial judge noted that defendant's claims regarding punitive damages were without merit or were waived. The instructional error was waived because defendant failed to tender what it considered to be proper instructions, and defendant's argument that it had already been punished sufficiently was waived because the evidence was not presented at trial. We do not agree that without a more thorough discussion there cannot be an effective appellate review.

Furthermore, the procedures for post-trial and appellate review are sufficient. Section 2-1207 of the Code of Civil Procedure provides that a trial court has discretion to determine whether a punitive damages award is excessive and, if so, may enter a remittitur and conditional new trial. (Ill.Rev.Stat. 1989, ch. 110, par. 2-1207.) Also, in *Hazelwood,* the court outlined three factors that should be considered when determining whether a punitive damages award is excessive. Those factors include the enormity of the wrong, the defendant's financial status, and the potential liability of the defendant. (*Hazelwood* v. *Illinois Central Gulf R.R.* (1983), 114 Ill.App.3d 703, 71 Ill.Dec. 320, 450 N.E.2d 1199.) These factors are not exhaustive. Each case must be assessed in light of its particular facts, and the underlying purposes of an award must be satisfied. (*Deal,* 127 Ill.2d at 204, 130 Ill.Dec. 200, 537 N.E.2d 267.) We believe these procedures for review of the awards are constitutionally sufficient.

We also note the prejudgment protections against punitive damage awards both prior to trial and before the punitive damages issue is presented to the jury. Section 2-604 of the Code of Civil Procedure requires that before a plaintiff can file a pleading seeking punitive damages, the plaintiff must establish at an evidentiary hearing "a reasonable likelihood of proving facts at

trial sufficient to support an award of punitive damages." (Ill.Rev.Stat.1989, ch. 110, par. 2-604.1.) This determination was made before the trial began in the case at hand. Also, the trial court decides whether the evidence makes a *prima facie* case for punitive damages. (*Knecht* v. *Radiac Abrasives, Inc.* (1991), 219 Ill.App.3d 979. 162 Ill.Dec. 434, 579 N.E.2d 1248.)

This determination was made here on defendant's motion to prevent the issue from being submitted to the jury and when the court considered the jury instructions. The trial court then submitted the issue to the jury, whose decision was whether to award punitive damages and, if so, in what amount.

3. Substantive Due Process: Excessiveness

Defendant argues that these awards must be reviewed under substantive due process standards for excessiveness. We find that these awards do not violate due process in this case. As stated in *Haslip,* there is no bright line between what is constitutionally acceptable or unacceptable. (*Haslip,* 499 U.S. at ___, 111 S. Ct. at 1043, 113 L.Ed.2d at 20.) We also reject defendant's claim, based on *Haslip,* that we should consider the relativeness of the awards to a comparable civil fine in Illinois and that since Illinois does not have a civil fine, the awards must be excessive. *Haslip* did not require that this be considered, and we do not believe that the absence of an Illinois law allowing a civil fine to be imposed means that the awards are excessive and lack an objective basis. The supreme court in *Haslip* indicated that the punitive damages awarded in that case were "much in excess of the fine that could be imposed for insurance fraud" in Alabama and took note that a person could be imprisoned for fraud. (*Haslip,* 499 U.S. at ___, 111 S. Ct. at 1046, 113 L.Ed.2d at 23.) We do not see the need to discuss whether defendant or its

employees violated the criminal laws of Illinois. It should be readily apparent that whenever an individual or company is made aware that contact with its product can cause a horrible disease and death, society expects that individual or company to take whatever steps that are reasonable and necessary to warn the public of the dangers and to prevent such contact with the product that could be fatal. As noted before, a $5 million verdict for punishment and deterrence for willfully and wantonly causing five persons to suffer asbestosis "does not cross the line into the area of constitutional impropriety". *Haslip*, 499 U.S. at ___, 111 S. Ct. at 1046, 113 L.Ed.2d at 23.

4. Multiple Punitive Damage Awards

Defendant argues the violation of its procedural and substantive due process rights through multiple punitive damage awards for similar conduct should compel us to vacate the awards.

Defendant urges that due process requires this court to establish meaningful procedures to protect it from multiple punishments and that these procedures "should apply to prevent the issue of punitive damages from ever being submitted to the jury in this case based on the facts established in the McComber affidavit." We do not need to decide if meaningful procedures should be established in this case, because defendant failed to present any evidence to the court of the matters contained in the McComber affidavit until after the trial.

We note again that Illinois does provide sufficient guidelines, which also act to protect a defendant from multiple punishments, specifically the court's consideration of defendant's potential liability. (*Hazelwood* v. *Illinois Central Gulf R.R.* (1983), 114 Ill.App.3d 703, 71

Ill.Dec. 320, 450 N.E.2d 119.) In this case, defendant did not submit the McComber affidavit until it filed its post-trial motion. Defendant cannot now complain that in light of the allegations in the McComber affidavit the trial judge erred in submitting the issue of multiple punitive damage awards to the jury, because at that time trial judge was unaware of the McComber affidavit. The trial judge has enough burdens without being further saddled with the burden of learning of and presenting defendant's case.

IV.

EXPERT TESTIMONY

Defendant's next argument raises the most perplexing issue in this case. Defendant contends that the trial court erred by allowing plaintiffs' expert, Dr. Wagoner, a biostatistician and epidemiologist, to read into evidence the underlying data and information on which he based his opinion that asbestos was linked to asbestosis by 1930 and to lung cancer between 1949 and 1955.

One of the issues in the case was defendant's knowledge regarding the hazards of asbestos. Plaintiffs offered Dr. Wagoner's testimony to show when the relationship between asbestos and asbestosis was established and to show that medical and industrial literature existed, prior to the time that defendant put warning labels on Kaylo, that end-users of asbestos products had contracted asbestos-related diseases. Plaintiffs hoped to prove by Dr. Wagoner's testimony that it was generally known within the asbestos industry and by defendant by 1955 that asbestos caused asbestosis and lung cancer. A jury could then conclude from all of the evidence that defendant had deliberately chosen to ignore and cover-up the dangers of asbestos for more than 17 years without warning end-users or finding a substitute for asbestos.

Over defendant's objection, the trial judge allowed Dr. Wagoner to summarize, in detail, various medical and industrial articles published before 1955 pertaining to studies performed and their results regarding the effects of asbestos. Defendant argues that the doctor's testimony was inadmissible under *Schuchman* v. *Stackable* (1990), 198 Ill.App.3d 209, 144 Ill.Dec. 493 555 N.E.2d 102, *appeal denied* (1990), 133 Ill.2d.573, 149 Ill.Dec. 338, 561 N.E. 2d 708, which defendant claims held that an expert may not read from medical literature. We decline to follow *Schuchman*, not because we believe it is wrong, rather we believe it to be distinguishable.

In *Schuchman*, this court relied on *Mielke* v. *Condell Memorial Hospital* (1984), 124 Ill.App.3d 42, 79 Ill.Dec. 78, 463 N.E.2d 216, which held that evidence of the content, or summaries of the content, of medical literature could not be introduced as substantive evidence. We believe that *Schuchman* is limited to those situations where the expert is not using the content of the medical literature as a basis for his or her opinion but rather the expert is attempting to bolster his opinion by showing that other experts agree with him. The expert witness then becomes a conduit for bringing before the jury a number of opinions of other experts without incurring the cost of hiring such experts and without subjecting these other experts to cross-examination. Under these circumstances it does not matter if the witness is an expert in the field for which he is called, but rather the only question is whether the witness can read!

Our case is distinguishable from *Schuchman*, because in *Schuchman* the literature was being offered in "support" of the expert's opinion and to show that "there are studies that exist that are consistent with his opinion", whereas in this case, the literature was offered as the underlying facts for Dr. Wagoner's opinion. In

Schuchman and *Mielke*, the excluded testimony was not directly pertinent to the litigation or to the plaintiff's treatment. In this case, the articles and studies published before 1955 were directly pertinent to the question, What did defendant know and when did it know it? The literature in *Schuchman* and *Mielke* was not necessary for the experts in those cases to form an opinion or to explain their opinion, whereas in this case Dr. Wagoner had to refer to the literature in order to explain his opinion and why he came to his opinion.

We recognize that this is just another area of the law that is evolving toward more openness in the presentation of evidence. While we are not prepared to go as far as Justice Chapman of this court, who wrote a vigorous dissent in *Schuchman* in which he stated that he believed *Mielke* had been implicitly overruled by *People* v. *Anderson* (1986), 113 Ill.2d 1, 99 Ill.Dec. 104, 495 N.E.2d 485, *cert. denied Illinois* v. *Anderson* (1986), 479 U.S. 1012, 107 S.Ct. 658, 93 L.Ed.2d 713 (*Schuchman* v. *Stackable* (1990), 198 Ill.App.3d 209, 231, 144 Ill.Dec. 493, 507, 555 N.E.2d 1012, 1026 (Chapman, J., dissenting)), we recognize that *Anderson* certainly uses such broad language that one might draw the conclusion, as did Justice Chapman, that an expert witness can give a complete history and summary of all of the scientific literature on a particular subject as long as he states that such literature is the basis of his opinion.

In *Anderson*, our supreme court held, after interpreting and analyzing Federal Rules of Evidence 703 and 705, *People* v. *Ward* (1975), 61 Ill.2d 559, 338 N.E.2d 171, and *Wilson* v. *Clark* (1981), 84 Ill.2d 186, 49 Ill.Dec. 308, 417 N.E.2d 1322, *cert. denied Clark* v. *Wilson* (1981), 454 U.S. 836, 102 S.Ct. 140, 70 L.Ed.2d 117, that "an expert should be allowed to reveal the content of materials upon which he reasonably relies in order to explain the basis of his opinion." (*Anderson*, 113 Ill.2d at 9, 99 Ill.Dec.

at 107, 495 N.E.2d at 488.) The only limitations are that the expert reasonably relied on the material and its probative value must outweigh any prejudicial impact. (*Ziekart* v. *Cox* (1989), 182 Ill.App.3d 926, 131 Ill.Dec. 376, 538 N.E.2d 751.) A trial court's determination of whether the underlying facts or data upon which the expert bases his opinion are of a type reasonably relied on by experts in the particular field will not be disturbed absent an abuse of discretion. *City of Chicago* v. *Anthony* (1990), 136 Ill.2d 169, 144 Ill.Dec. 93, 554 N.E.2d 1381, *cert. denied Anthony* v. *City of Chicago* (1990), 498 U.S. 900, 111 S.Ct. 256, 112 L.Ed.2d 214.

The court in *Anderson* did worry about the information forming the basis of the expert's opinion being misused by the jury as substantive evidence and suggested a limiting instruction advising the jury to consider such underlying information only to evaluate the basis of the expert's opinion. (*Anderson*, 113 Ill.2d at 12, 99 Ill.Dec, at 109, 495 N.E.2d at 490.) The court also hedged its ruling by advising that "[a] trial judge, of course, need not allow the expert to recite second information when its probative value in explaining the expert's opinion pales beside its likely prejudicial impact or its tendency to create confusion". *Anderson*, 113 Ill.2d at 12, 99 Ill.Dec. at 109, 495 N.E.2d at 490.

We believe that the trial court in this case properly permitted Dr. Wagoner to summarize the articles as a basis of his opinion and to show notice to defendant. Dr. Wagoner was not citing the articles to show that other experts agreed with him or even to show that the articles proved the truth of the matter asserted, that asbestos causes asbestosis. His testimony and summary of the articles was intended to show when, in his opinion, it was generally known or should have been known in the industry that asbestos caused asbestosis

and was linked to cancer. If Dr. Wagoner has been prevented from summarizing and quoting from the various articles, then we would have had the bare opinion that defendant should have known of the connection between asbestos and asbestosis and cancer because there were articles written before 1955 that said so. Our supreme court recognized this problem in *Anderson* and stated: "Absent a full explanation of the expert's reasons, including underlying facts and opinions, the jury has no way of evaluating the expert testimony [citation] and is therefore faced with a meaningless conclusion." (*Anderson*, 113 Ill.2d at 11, 99 Ill.Dec. at 108, 495 N.E.2d at 489.) Allowing Dr. Wagoner to summarize the medical literature permitted the jury to better asses the weight and credibility of his testimony.

There is another exception to the hearsay rule that is applicable to the issue before this court, and that exception is notice. The hearsay rule prohibits introducing into evidence an out-of-court statement, written or oral, that is offered for the truth of the matter asserted therein. (*People* v. *Campbell* (1975), 28 Ill.App.3d 480, 328 N.E.2d 608.) An out-of-court statement offered for some independent purpose, rather than the truth of the matter asserted, is not hearsay. (*Thornton* v. *University Civil Service Merit Board* (1987), 154 Ill.App.3d 1016, 107 Ill.Dec. 893, 507 N.E.2d 1262.) A writing that is offered to prove that the recipient had notice of the information contained therein rather than to prove the truth of the matter asserted is admissible. (*People* v. *Campbell* (1975), 28 Ill.App.3d 480, 486, 328 N.E.2d 608, 615; *Charleston National Bank* v. *International Harvester Co.* (1974), 22 Ill.App.3d 999, 317 N.E.2d 585; *Hanlon* v. *Arico Industrial Gases* (1991), 219 Ill.App.3d 777, 162 Ill.Dec. 322, 579 N.E.2d 1136, *appeal denied* (1992), 143 Ill.2d 638, 167 Ill.Dec. 399, 587 N.E.2d 1014.) Further, a newspaper article may fall within the exception to the

hearsay rule showing notice. *Deerhake* v. *Du Quoin State Fair Association* (1989), 185 Ill.App.3d 374, 381, 133 Ill.Dec. 508, 511, 541 N.E.2d 719, 722, *appeal denied* (1989), 127 Ill.2d 613, 136 Ill.Dec. 583, 545 N.E.2d 107.

Defendant admitted in interrogatories that it received certain medical and industrial journals. Dr. Wagoner also testified on the content of various articles contained in those journals that should have put defendant on notice that people using asbestos products could develop asbestos-related diseases. Since two of the underlying issues in this case were, What did defendant know? and When did defendant know it?, evidence of the content of the articles that defendant received was the only method plaintiffs had, other than trying to search for key employees that worked for defendant 35 years or more ago as witnesses, in order to prove what and when defendant knew of the dangers of asbestos.

The judge issued two cautionary instructions to the jury that that evidence was not to be considered for its truth but, rather, it was only relevant to the issue of notice: what defendant knew or should have known. Furthermore, defendant had the opportunity to rebut this by presenting evidence on the "state of the art" issue through its own witnesses.

Finally, we determine that the probative value of the evidence of the studies out-weighed its prejudicial effect because it is no longer disputed that, in fact, asbestos is linked to various lung disorders. Thus, the opinions contained in the articles and literature were not in dispute, and therefore such opinions could not be prejudicial.

V.
DEPOSITION TESTIMONY

Herman Davis testified at trial that he had seen Kaylo throughout the Amoco facility. Defendant then, on cross-examination, sought to impeach Davis by reading a portion of his deposition where Davis indicated he had only seen Kaylo at a storage building. On rebuttal, plaintiffs' counsel read another portion of Davis's deposition in which Davis was asked which products he was able to identify. Plaintiff's counsel read only a portion of Davis's answer; "the Kaylo pipe covering and block." Plaintiffs' counsel did not read the other portion of the answer wherein Davis identified five other products he had seen at the plant. Defendant objected, arguing that the entire answer should have been read to the jury because reading only that portion gave the jury the erroneous impression that Kaylo was the only product Davis could remember and identify. The trial court ruled that the evidence was properly excluded based on *Lipke*, which the court relied on in excluding evidence of exposure to other, asbestos-containing products.

Defendant argues that it was error to allow only a portion of the deposition to be read and not the remainder because *Lipke* does not support the exclusion of evidence of exposure to other asbestos products and it was a violation of Supreme Court Rule 212(c) (134 Ill.2d R. 212(c)).

We first note that, as we stated in our ruling in defendant's first argument, evidence of exposure to other manufacturers product is irrelevant. We must next consider, however, whether, in light of our ruling, Rule 212(c) requires that the entire answer should have been read. We conclude that it does not.

> Supreme Court Rule 212(c) states in part: "If only a part of a deposition is read or used at the trial by a party, any other party may at that time read or use or require him to read any other part of the deposition which ought *in fairness* to be considered." (Emphasis added.) 134 Il.2d R. 212(c).

"Fairness" is the standard when considering whether the additional part of a deposition sought to be used should also be read into evidence. (Ill.Ann.Stat., ch. 110A, par. 212(c), Historical and Practice Notes at 304 (Smith-Hurd 1985); see *Dombrowski* v. *Laschinski* (1978), 67 Ill.App.3d 506, 24 Ill.Dec. 268, 385 N.E.2d 35.) As stated in *Morse* v. *Hardinger* (1976), 34 Ill.App.3d 1020, 1025, 341 N.E.2d 172, 176, "[t]hough the fairness referred to in Rule 212(c) must always be insured, it must not be used as an excuse to sweep irrelevant material into evidence." Evidence of exposure to other manufacturers products is irrelevant. Therefore, we conclude that the evidence was properly excluded.

VI.
POOR SETTLEMENT

An intraoffice document, dated August 21, 1969, referred to new lawsuits against defendant and to an unrelated asbestos case in which defendant settled. The document stated in part: "The Claude Tomplait case settled out of court with payment earlier this year." Defendant's objection on the grounds that it could not be admitted because it referred to a settlement was overruled, and the document was admitted.

Defendant argues that the trial court erred by admitting the document into evidence because it contained a reference to a settlement by defendant in a prior asbestos suit. We disagree.

Evidence of settlement is generally inadmissible, and this rule has applied to a settlement with a third party arising out of the same automobile accident (*Hill* v. *Hiles* (1941), 309 Ill.App. 321, 32 N.E.2d 933) and to a settlement that did not arise out of the same occurrence (*Illinois State Toll Highway Authority* v. *Heritage Standard Bank & Trust Co.* (1990), 196 Ill.App.3d 5, 142 Ill.Dec. 410, 552 N.E. 2d 1151 *appeal denied* (1990), 133 Ill.2d 556, 149 Ill.Dec. 322, 561 N.E.2d 692). In the case at hand, however, the admission of the evidence does not require reversal.

This evidence of an unrelated settlement came in one of several memos and referred to an incident that occurred in 1969. The evidence was not introduced to show liability but was contained in a memo used to show notice and defendant's knowledge that asbestos was dangerous and yet continued to produce the Kaylo in spite of the hazards to the health of end-users. We cannot say that admitting this evidence of settlement was so prejudicial that it had a material effect on the outcome (*J.L. Simmons Co.* v. *Firestone Tire & Rubber Co.* (1985), 108 Ill.2d 106, 90 Ill.Dec. 955, 483 N.E.2d 273), and we therefore refuse to reverse on this basis.

VII.
FEAR OF CANCER

Defendant argues that plaintiffs Reneau, Granger, Davis failed to offer sufficient evidence to allow recovery for fear of cancer.

We note at the outset that plaintiffs did not make a separate claim for fear of cancer, nor was this claim for increased risk of cancer. Fear of cancer was only part of emotional distress, an element of pain and suffering.

At trial, plaintiffs Reneau, Granger, and Davis sought to recover for fear of cancer as an element of emotional

distress. The trial judge distinguished this case, where there was an alleged underlying injury from a case where there was no claim for fear of cancer. The trial judge was unable to find an Illinois case pertaining to what was required in order to recover for fear of cancer, and so he ruled based on *Dartez* v. *Fibreboard Corp.* (5th Cir. 1985), 765 F.2d 456, that two foundation requirements must be satisfied. Plaintiffs were required to show: first, that plaintiffs had some knowledge, through some type of communication, that their condition may become worse, *i.e.*, it may turn into cancer; and second, that there must be competent medical evidence indicating to a reasonable degree of medical certainty that they either are at an increased risk of cancer or that they might or could develop cancer. If the plaintiffs met both of these tests, then evidence of damages for fear of cancer would be admissible; these damages would not be to compensate them for future cancers that may result, but would be for the emotional distress or fear that cancer may result. The judge said he would entertain a motion to strike if the proper foundation were not laid.

Plaintiffs' medical experts, Dr. Yanta and Dr. Wagoner, testified that each plaintiff was at an increased risk of cancer. Defendant claims, however, that Granger, Davis, and Reneau each failed to offer sufficient evidence on the first requirement.

When ruling on the jury instructions regarding pain and suffering, the trial judge ruled that the part of the instruction stating, "the reasonable fear and anxiety experienced so on and so forth with respect to risk of caner[,] that is stricken. That is all contained in the element of damages pain and suffering." Thus, the jury was not specifically instructed on fear of cancer as a separate element of damages, nor did the instructions men-

tion fear of cancer itself. The verdict forms returned by the jury did not refer to fear of cancer, but only to past and future pain and suffering. There is no evidence that the jury's award reflected any fear-of-cancer claim.

In plaintiffs' counsel's closing argument on the issue of damages, he referred to past and future pain and suffering, "including fear of cancer," and informed the jury what he thought it was worth.

We find that any error regarding this issue has been waived. The trial judge said he would entertain a motion to strike if the foundation was not met, and defendant did not make such a motion. Defendant also did not object to plaintiffs' counsel's closing argument or attempt to have the judge inform the jury that they should not consider fear of cancer as part of pain and suffering.

VIII.
REDUCTION OF DAMAGES

Defendant's last argument is that, in the alternative, the amount of the award should be reduced to reflect the amount of the settlements paid by the settling defendants.

Prior to trial there were several defendants. Just after the trial began, all of the defendants, except for OCF, allegedly settled with plaintiffs. Defendant, citing section 2 of the Contribution Act (Ill.Rev.Stat. 1989, ch. 70, par. 302(c)), argues that as a matter of law we should reduce the jury award by these amounts. Section 2(c) states:

> "When a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury of the same wrongful death, it does

> not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide but it reduces the recovery on any claim against the others to the extent of any amount stated in the release of the covenant, or in the amount of the consideration actually paid for it, whichever is greater." Ill.Rev.Stat. 1989, ch. 70 par. 302(c).

Defendant did not raise the right to reduce the judgment by any settlements in its post-trial motion. Plaintiffs claim that any reduction in the judgment is waived because of defendant's failure to raise such in its post-trial motion. However, the trial judge has not been given the opportunity to decide the issue of whether defendant is entitled to a set off against compensatory damages and, if so, in what amount.

In light of the foregoing, the judgment awarding punitive damages is affirmed. The judgment awarding compensatory damages is conditionally affirmed; we remand to the circuit court for a determination of whether defendant has the right to a set off against compensatory damages, and if so, in what amount.

Affirmed in part; conditionally affirmed in part and remanded with directions.

WELSH and GOLDENHERSH, JJ.*, concur.

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* **Justice Harrison participated in oral argument. Justice Goldenhersh was later assigned to this case in substitution for Justice Harrison, and Justice Goldenhersh read the briefs and listened to the audiotape of oral argument.**

JUDGMENT ORDER

(State of Illinois — County of Madison — Third Judicial Circuit Court)

(Filed November 2, 1990)

(IN RE: ASBESTOS LITIGATION CASES FILED BY BARON & BUDD; HARRY RENEAU, et al, CLARENCE WOODWARD, et al, CLIFFORD DAVIDSON, HERMAN DAVIS, et al, CLARENCE GRANGER, et al, GEORGE GWALTNEY, et al, LEROY JOHNSON, et al, JOHN KOCHAN, HENRY STEPANICH, et al, Plaintiffs, v. A.P. GREEN, et al, Defendants — 87-L-870, 87-L-498, 86-L-1618, 86-L-1653, 86-L-1651, 86-L-1487, 86-L-1574, 86-L-1650, 86-L-874 [*handwritten correction: 87-L-874*])

On November 1st, 1990, the jury in the above-entitled cases returned the following verdicts:

"We, the jury find for the plaintiff, JOHN KOCHAN, and against the defendant OWENS-CORNING FIBERGLAS CORPORATION.

We assess compensatory damages itemized as follows:

Disability resulting from the injury:	$90,000
Aggravation of any pre-existing ailment or condition:	$0
Past pain and suffering:	$21,500
Future pain and suffering:	$77,000
Past loss of time or earnings:	$0
Future loss of time or earnings:	$0
We assess punitive damages for wilful and wanton conduct as follows:	$1,000,000

If your verdict in Count I is in favor of plaintiff, John Kochan, state the year in which he sustained injury as a result of his exposure to defendant's product: *Year:* 1964

We the jury find for the plaintiff, HARRY RENEAU, and against the defendant OWENS-CORNING FIBERGLAS CORPORATION.

We assess compensatory damages itemized as follows:

Disability resulting from the injury:	$105,000.00
Aggravation of any pre-existing ailment or condition:	$55,000.00
Past pain and suffering:	$42,500
Future pain and suffering:	$120,000.00
We assess punitive damages for wilful and wanton conduct as follows:	$1,000,000

We the jury find for the plaintiff, ARVADA RENEAU, and against the defendant, OWENS-CORNING FIBERGLAS CORPORATION.

We assess compensatory damages as follows:

The reasonable value of the society and companionship with her husband of which she has been deprived and the society and companionship with her husband of which she is reasonably certain to be deprived in the future[:]	$0
The reason[*able*] value of the services of her husband of which she has been deprived and the present	

cash value of the services of her husband of which she is reasonably certain to be deprived in the future[.] $10,000

We the jury find for the plaintiff, CLARENCE GRANGER, and against the defendant OWENS-CORNING FIBERGLAS CORPORATION.

We assess compensatory damages itemized as follows:

Disability resulting from the injury: $200,000

Aggravation of any pre-existing ailment or condition: $0

Past pain and suffering: $90,000

Future pain and suffering: $125,000

Past loss of time or earnings: $0

We assess punitive damages for wilful and wanton conduct as follows: $1,000,000

We the jury find for the plaintiff, HILMA GRANGER, and against the defendant, OWENS-CORNING FIBERGLAS CORPORATION.

We assess compensatory damages as follows:

The reasonable value of the society, companionship and sexual relationship with her husband of which she has been deprived and the society, companionship, of which she is reasonably certain to be deprived in the future[.] $0

The reasonable value of the services of her husband of which she

has been deprived and the present cash value of the services of her husband of which she is reasonably certain to be deprived in the future[:]	$20,000

We the jury find for the plaintiff, URSEL WOODWARD, and against the defendant, OWENS-CORNING FIBERGLAS CORPORATION.

We assess compensatory damages as follows:

The reasonable value of the society and companionship with her husband of which she has been deprived and the society and companionship with her husband of which she is reasonably certain to be deprived in the future[:]	$0
The reasonable value of the services of her husband of which she has been deprived and the present cash value of the services of her husband of which she is reasonably certain to be deprived in the future[:]	$10,000

We the jury find for the plaintiff, CLARENCE WOODWARD, and against the defendant OWENS-CORNING FIBERGLAS CORPORATION.

We assess compensatory damages itemized as follows:

Disability resulting from the injury:	$250,000
Aggravation of any pre-existing ailment or condition:	$60,000
Past pain and suffering:	$130,000

Future pain and suffering:	$30,000
Past loss of time or earnings:	$0
Future loss of time or earnings:	$0
We assess punitive damages for wilful and wanton conduct as follows:	$1,000,000

We the jury find for the plaintiff, HERMAN DAVIS, and against the defendant OWENS-CORNING FIBERGLAS CORPORATION.

We assess compensatory damages itemized as follows:

Disability resulting from the injury:	$23,000
Aggravation of any pre-existing ailment or condition:	$0
Past pain and suffering:	$30,000
Future pain and suffering:	$75,000
Past loss of time or earnings:	$0
Future loss of time or earnings:	$0
We assess punitive damages for wilful and wanton conduct as follows:	$1,000,000

We the jury find for the plaintiff, ELIZABETH DAVIS, and against the defendant, OWENS-CORNING FIBERGLAS CORPORATION.

We assess compensatory damages as follows:

The reasonable value of the society, companionship and sexual relationship with her husband of which she has been deprived and the society, companionship,	

and sexual relationship with her husband of which she is reasonably certain to be deprived in the future[:]	$0
The reasonable value of the services of her husband of which she has been deprived and the present cash value of the services of her husband of which she is reasonably certain to be deprived in the future[:]	$10,000

If your verdict in Count I is in favor of plaintiff, Herman Davis, state the year in which he sustained injury as a result of his exposure to defendant's product:

Year: 1986

We, the jury, find against Henry Stepanich and in favor of Owens-Corning Fiberglas.

We, the jury, find against George Gwaltney and in favor of Owens-Corning Fiberglas.

We, the jury, find against Clifford Davidson and in favor of Owens-Corning Fiberglas.

We, the jury, find against Leroy Johnson and in favor of Owens-Corning Fiberglas."

The foregoing verdicts were signed by the twelve jurors: Michael G. Heflin, Brenda Hawkins, Kathy Cook, Eddie Young, Lee C. McGuire, Dawn W. Crosby, Brenda L. Boyer, Debra A. Littekin, Theodore C. Pauli, Rodney Jackson, Christie L. Kondoudis, Donald Hill

At the request of the defendant the jury was polled, and each juror reaffirmed that each verdict was his or her own verdict, and that it remained his or her own

verdict at the time of polling. Accordingly, judgment is hereby entered on the verdicts this date.

Copy of Judgment Order to be sent to counsel of record.

ENTERED THIS 2nd DAY OF NOVEMBER 1990.

/s/ Gordon Maag
Presiding Judge

(*Certification Omitted*)

ORDER

(State of Illinois — County of Madison —
Third Judicial Circuit Court)

(Filed February 15, 1991)

(HARRY RENEAU, et al., CLARENCE WOODWARD, et al., HERMAN DAVIS, et al., CLARENCE GRANGER, et al., JOHN KOCHAN, et al., Plaintiffs, vs. OWENS-CORNING FIBERGLAS, et al., Defendants — Nos. 87-L-870, 87-L-498, 86-L-1653, 86-L-1651, 87-L-1650)

Before the Court is a Post-Trial Motion filed by the defendant Owens-Corning Fiberglas along with a supporting memorandum and other materials. The plaintiffs have filed a memorandum in opposition to the Post-Trial Motion. OCF has also filed a Motion to Amend the Post-Trial Motion and plaintiffs have objected. After considering these pleadings along with the arguments of counsel and being fully advised in the premises, the Court rules as follows:

A. Paragraphs 1-5 of the Post-Trial Motion each claim that the evidence was insufficient to support a verdict in favor of the respective plaintiff. There is no specificity to these claims and OCF has failed to renew their motion for a directed verdict as required by Chapter 110, Section 2-1202. The claims are waived. In the alternative the Court believes the evidence was sufficient.

B. Paragraph six claims that the Court erred in denying a Motion for Change of Venue pursuant to Chapter 110, Section 2-1001. OCF also requests leave to amend this paragraph. While the Court has serious doubts that it has authority to allow amendments after the time for filing a Post-Trial Motion has expired, nevertheless the Court allows the Motion to Amend.

Turning to the amended allegation of error, the Court believes the claim is without merit. In 1986 thousands of asbestos related suits were filed in this county. To manage this volume of litigation Judge Chapman was assigned to oversee these cases. The plaintiffs in these thousands of cases were represented by four separate firms, with each firm representing several hundred plaintiffs. To expedite and simplify the progress of these cases and to prevent or at least limit duplication and expense, lead cases were designated. On November 16, 1987 Judge Chapman entered an order in the asbestos litigation, a copy of which is attached hereto as Exhibit "A".* Exhibit "A" permitted the filing of pleadings under a lead case designation and provided that if so designated the motion or pleading would apply to all cases filed by a given plaintiffs' firm. In the alternative, parties were permitted to limit pleadings filed to a particular case.

Many of the issues raised in the asbestos litigation are common to all cases and have arisen repeatedly. This commonality is demonstrated by Judge Chapman's October 7, 1988 order attached hereto as Exhibit "B". Exhibit "B" is an order ruling on numerous *in limine* motions and making these rulings applicable to all pending asbestos cases.

Later Judge Riley was assigned to take charge of the asbestos litigation. On March 16, 1989 Judge Riley entered a Standing Order governing the asbestos litigation in this county. This order standardized pleadings; regulated discovery and the admission of evidence; and set forth standards for non-expert and expert disclosures and discovery. This Standing Order is attached as Exhibit "C".

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* [*Printer's note*]: **Referenced attachments are not included in this reproduction.**

With this background, the undersigned Judge was assigned on April 7, 1989 to assist Judge Riley in the asbestos litigation. The two assignment orders applicable to this Judge are and have been on file in the office of the Chief Judge and the circuit clerk since being entered. They are attached hereto as Exhibit "D" and "E". During April 1989 a hearing on various asbestos motions was held and the undersigned was introduced to all counsel, including counsel for OCF and they were informed of the assignment.

The foregoing demonstrates that these asbestos cases at issue in the OCF Post-Trial Motion, along with the other cases on file in this county are part of an integrated series of cases as described in *Marshall Savings* v. *Henson*, 78 Ill.App.2d 14 (1966) and *Wilsonville* v. *SCA*, 77 Ill.App.3d 618, 639-40 (1979). At the hearing on the Post-Trial Motion OCF acknowledged that this Judge had ruled on numerous substantive issues in the asbestos litigation that impacted on the cases on file in this county; and that these rulings were prior to the Motion for Change of Venue. OCF claims, however, that these rulings were not made specifically in the Reneau, Woodward, Davis, Granger and Kochan cases. An identical argument was made and rejected in the *Marshall* and *Wilsonville* cases, *supra*.

Despite OCF's claim that these cases are not part of an integrated series, when they filed their Motion for Change of Venue they filed it using the lead case designation. OCF did not specify the motion as applying to any particular case, much less the Reneau, Woodward, Davis, Granger or Kochan cases. Judge Chapman's Order, Exhibit "A" did not compel OCF to use the lead case designation.

This Judge also participated along with Judge Riley in the hearings on integrating Johns-Manville into the

asbestos litigation. While Judge Riley actually entered the integration order, all parties including OCF were aware that both the undersigned and Judge Riley would consider the integration issue.

During June and July 1989 both Judge Riley and the undersigned held hearings on proposed changes to the Standing Order. All counsel including OCF participated in these hearings. This Judge heard argument, questioned counsel for clarification and on July 14, 1989 a supplement to the Standing Order was entered. See Exhibit "F" attached hereto. Again, Judge Riley entered the actual order; however, all counsel were aware that this Judge would participate in the decision. Where the litigant is given an opportunity to form an opinion as to the court's reaction to their claims, a later motion for change of venue comes too late. *In Re Marriage of Kenik*, 181 Ill.App.3d 266 (1989).

Finally, on August 30, 1989 W. R. Grace & Company filed a Motion for Clarification and Sanctions. This motion specified the file numbers in each of the five cases that are the subject of this Post-Trial Motion and also used the lead case designation. See Exhibit "G". A transcript of the hearing on the Motion for Clarification and Sanctions is attached to Plaintiffs' response to the Post-Trial Motion. This hearing was held August 31, 1989. At page two of the transcript counsel for W. R. Grace makes clear that the motion applied to *all* pending Baron & Budd cases. At page six counsel for W. R. Grace charges plaintiffs with violating this Court's prior orders and with intentionally impeding discovery. In the motion and at the hearing W. R. Grace sought sanctions pursuant to Chapter 110, Section 2-611 and Supreme Court Rule 219. See page seven of the transcript. Counsel for W. R. Grace acknowledged that this Judge has "time and time again" been required to rule upon

witness disclosures mandated by the various standing orders. In opposition counsel for the plaintiff claimed the real problem was the threat that due to repeated depositions of witnesses who were also plaintiffs, a risk existed that these plaintiff/co-worker witnesses could be impeached at the time of trial with multiple depositions. See page 21 of the transcript. This Judge then issued an oral order. See pages 21-27. The order provided:

1. Plaintiffs were ordered to allow the witness to answer subject to objection In the alternative, if plaintiffs believed that the question was burdensome or oppressive they were told to terminate the deposition and move for a protective order. See pages 22 and 23.

2. The subject of the inquiry was restricted.

3. An evidentiary ruling applicable to the use of depositions at trial was issued, and this Judge's interpretation of Rule 212(C) was made known. See pages 22 and 26.

4. The Motion for Sanctions was denied. See page 26.

5. A witness was ordered to appear for further questioning.

Clearly, the Motion for Sanctions that was ruled upon was similar to the contempt citation at issue in *Harrisburg Coal* v. *Endercoal*, 272 Ill.App. 113 (1933) where it was held that a ruling on a contempt motion for discovery violation was a substantive ruling. It is also extablished that extending a discovery cutoff and ruling on a Rule 219 Motion for Sanctions are both substantive rulings as contemplated by Chapter 110, Section 2-1001. See *Perimeter Exhibits* v. *Glenbard*, 122 Ill.App.3d 504, 514 (1984). A ruling on a motion for sanctions under 2-611 is

also a substantial ruling. *Dolido* v. *Zenith Radio Corp.*, 194 Ill.App.3d 268 (1990).

Moreover, this Court's ruling on the use of portions of depositions under Rule 212(C) was an evidentiary ruling which was substantive.

Counsel for OCF attended this hearing and participated. See pages eight, nine and ten of the hearing transcript.

For all the foregoing reasons, no error took place in denying the Motion for Change of Venue.

C. Paragraphs seven and eight of the Post-Trial Motion are without merit. Most of the claims were not raised at the time of trial and are waived. The claims of instructional error are without merit since OCF failed to tender what they considered to be proper instructions. The issue is waived. *Deal* v. *Byford*, 127 Ill.2d 192 (1989) *as respects the claim that OCF has already been punished sufficiently, the Court notes that this argument was not made at the time of trial; the McComber affidavit was not filed at the time of trial; and while OCF lists several prior punitive awards in the McComber affidavit, in only one case does OCF claim to have *paid* any punitive awards. A party cannot be excessively punished with a mere verdict and judgment. Punishment only occurs when payment is made.

Additionally, this Court is unaware of what evidence was presented in those other cases resulting in punitive awards. Due to the failure to make an offer of proof this Court would be guessing about what conduct led to the awards.

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* [*Printer's note*]: Punctuation missing in original.

Having considered the arguments and claims, the Court finds them to be without merit even in the absence of waiver.

D. The claims made in paragraphs nine, ten, eleven, twelve and thirteen have been considered and are without merit.

E. OCF claims in paragraph fourteen that the Court erred in allowing evidence on fear of cancer. "It is proper to admit evidence of the possible side effects of a substance even if these side effects have not yet been experienced." *Abrams* v. *City of Mattoon*, 148 Ill.App.3d 657, 666-667 (1986). "Increase in the risk of injury is proper evidence. Such evidence goes to pain and suffering." *Lindsey* v. *Appleby*, 91 Ill.App.3d 705, 714 (1980). "Fear, fright and shock are proper subjects for testimony if accompanied by contemporaneous physical injury." *Elgin* v. *A. S. Traction Co.*, 217 Ill. 47, 55 (1905); *Nueberg* v. *Michael Reese Hospital*, 66 Ill.App.3d 679, 683 (1978). Each of the plaintiffs presented evidence of physical injury along with the evidence of fear of cancer. The cases cited by OCF on this issue do not apply. All of the OCF authority deals with mental distress unaccompanied by physical injury. The allegation of error is without merit.

F. Paragraphs 15, 16, 17, 18, 19 and 20 are without merit.

G. OCF claims in paragraph 21 that it was error to allow questions framed with the phrase "might or could". This was not error. *Abrams* v. *City of Mattoon*, 148 Ill.App.3d 657 (1986).

H. There is no merit to the claims made in paragraphs 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32.

I. At the hearing on the Post-Trial Motion OCF withdrew the claim made in paragraph 33.

J. The claims made in paragraphs 34 and 35 are without merit.

For the foregoing reasons the Post-Trial Motion is denied in its entirety.

Entered this 15th day of February, 1991

/s/ Gordon E. Maag
Associate Circuit Judge

ORDER
(DENYING PETITION FOR LEAVE TO APPEAL)

(State of Illinois — Supreme Court)

(October 6, 1993)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING • SPRINGFIELD, ILL. 62706

Mr. Thomas B. Weaver
Armstrong, Teasdale, Schlafly & Davis
One Metropolitan Square, S#2600
St. Louis, MO 63102-2740

No. 75259–John Kochan et al., respondents, v. Owens-Corning Fiberglas Corporation, petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Harrison II, J., took no part.

The mandate of this Court will issue to the Appellate Court on October 28, 1993.

ORDER
(REGARDING PAPERWORK REDUCTION IN ASBESTOS LITIGATION)

(State of Illinois — County of Madison —
Third Judicial Circuit Court)

(Filed November 16, 1987)

(IN RE: All Asbestos Litigation Filed by Bono, Haine and Schooley, MASTER FILE - ADAMS 86-L-1827; IN RE: All Asbestos Litigation Filed by Smith, Larson and Pitts, MASTER FILE - AUTREY 86-L-1679; IN RE: All Asbestos Litigation Filed by Baron and Budd/Pratt and Callis, MASTER FILE - GRECO 86-L-1351; IN RE: All Asbestos Litigation Filed by Lakin and Herndon, MASTER FILE - HARTNETT 87-L-1101)

The above Master Files have been set up by previous orders of the Court in an effort to cut down paperwork for the Clerk's office and for the attorneys involved in these cases. To date, many attorneys have been filing unnecessary duplicates of pleadings. Please be advised that it is only necessary to file one copy of any motion, document, etc. with the appropriate Master File caption and case number. The pleading will then apply to every case in the group. However, if you prefer, you may attach a separate listing of all case numbers that the pleading applies to but it should still be headed with the appropriate Master File caption and number. If you have any questions about the filing procedures in the asbestos litigation please feel free to contact Beth at the Circuit Clerk's office at (618) 692-6240, Ext. 4363.

Dated this 16th of November, 1987.

/s/ [*illegible*]
CIRCUIT JUDGE

ORDER

(State of Illinois — County of Madison —
Third Judicial Circuit Court)

(Filed October 7, 1988)

(IN RE: ALL ASBESTOS LITIGATION IN MADISON COUNTY)

These matters come before the Court upon the Court's request directed to counsel for all parties to file motions in limine which would deal with common evidentiary issues that would in all likelihood be presented in the asbestos cases pending in this county, and the Court having heard argument rules as follows:

(1) That the orders entered on this date are to be binding on all asbestos cases in Madison County to the extent appropriate.

(2) That counsel for all parties are to inform their clients and all witnesses of the contents of this order and counsel for all parties are responsible for advising their parties and their witnesses that the terms of these orders are to be followed and that matters prohibited by these orders are not to be alluded to without first bringing them up out of the presence of the jury; and that any allusion to matters prohibited by these orders whether on direct examination, cross examination, or by counsel in any statement are to be absolutely avoided. It is the responsibility of counsel to ensure that this does not occur.

The following orders will deal with the motions in the order in which they were argued at the hearing on Monday, October 3, 1988. As the Court indicated at that time, any motion filed by any plaintiff is considered raised by all plaintiffs, and that motion and ruling are

deemed filed and ruled upon as to each plaintiff so that the Court will not address separate motions by the various plaintiffs' groups which are duplicative of one another.

The Court will again proceed in the Order in which the matters were argued on Monday, October 3, 1988. The first plaintiffs group to present their motion was Baron & Budd, and the substantive portion of the motion begins with paragraph 5 of said pleading. The Court fules as follows:

(1) Motion to exclude collateral source matters is allowed.

(2) Motion to exclude the time or circumstances under which the plaintiffs employed their attorney is allowed.

(3) Motion to preclude comment on the taxation of any judgment is allowed.

(4) Motion to preclude comments regarding settlements is allowed.

(5) Motion to preclude comments regarding prior subsequent claims, suits or settlements is allowed.

(6) Motion to preclude comments regarding the fact that this motion has been filed or the ruling obtained is allowed.

(7) Motion to preclude comments regarding any witness who has not testified who was equally available to all parties is allowed.

(8) Motion to preclude the fact that plaintiffs' counsel have referred other plaintiffs to expert witnesses who testify in these cases is denied.

(9) Motion to preclude any comments to the effect that the Law Firm of Baron & Budd represents

or has been referred cases involving other asbestos-exposed individuals and other actions is allowed since statements to the effect that plaintiffs' counsel represents thousands of claimants in these cases are improper. However, evidence that plaintiffs' counsel have referred other plaintiffs to doctors or have consulted with other experts is not precluded by this paragraph. (See the preceding paragraph.)

(10) Motion to preclude comments that settlements have been attempted in these cases is allowed.

(11) Motion to preclude any allegation that plaintiffs have been exposed to asbestos-containing products manufactured by parties which are now in bankruptcy or who are not parties to the case at time of trial is allowed. (See *Lipke*.)

(12) Motion to preclude any statement or argument to the effect that insurance rates will be affected by these cases is allowed.

(13) Motion to preclude results of any studies conducted by an expert which have not been previously disclosed is allowed.

(14) Motion to preclude questions regarding the residency of the plaintiffs is allowed.

(15) Motion to preclude the fact that objections have been made by plaintiffs to Interrogatories or Requests for Production submitted by the defendants is allowed.

(16) Motion to preclude the defendants from requesting before the jury matters found or contained in the plaintiffs' files is allowed. (On its own motion, the Court imposes the same obligation on plaintiffs' counsel.)

(17) Motion to preclude any reference to any pleadings which have been superseded by the current pleadings on file is allowed except for admissions which are contained in prior pleadings.

(18) Motion to preclude any suggestion that the defendant personally will have to pay any judgment entered in this case is denied as to each case individually in which punitive damages are sought.

(19) Motion to preclude the offer into evidence of any pleading or discovery documents in the presence of the jury without first laying adequate foundation is allowed. (On the Court's own motion, the same order applies to plaintiffs' counsel.)

(20) Motion to preclude defendants from requesting a stipulation from counsel in the presence of the jury is allowed. (On the Court's own motion, the same order applies to plaintiffs' counsel.)

(21) Motion to preclude evidence of arrests, charges or convictions of any crime is allowed unless the matter is first brought to the attention of the Court.

(22) Motion to preclude evidence of alcoholism, drug abuse, or aberrant sexual habits of any plaintiff is allowed.

(23) Motion to preclude any evidence that plaintiffs "have sustained or suffered any illness, accident or injury other than the illnesses and/or diseases made the basis of the subject lawsuit" is denied as too broad.

Turning to the Motions in Limine filed on behalf of the Bono & Schooley plaintiffs:

Paragraph one of the same dealing with exposures of the plaintiffs to any asbestos or asbestos-containing product manufactured, sold or distributed by any company which is not a party to this litigation at time of trial is allowed. (See *Lipke* v. *Celotex Corporation*, 505 NE 2d 1213.)

Paragraph two of the Bono motion praying for exclusion of evidence of the plaintiffs' general health is denied as too broad.

At the time of the oral argument on said motions, Mr. Bono made two oral motions as follows:

That no one refer to the smoking habits of counsel or Court. That motion is allowed.

And that no one refer to the small market share of any defendant. That motion is allowed.

Turning to the Motions in Limine filed by Smith, Larson & Pitts, the Court orders as follows:

(a) Defendants are precluded from offering evidence or commenting on exposure to any asbestos product of parties who are not at time of trial a current defendant.

(b) Defendants are precluded from presenting evidence that plaintiffs were exposed to any non-asbestos toxic substance absent expert testimony showing that plaintiff's condition is related to that exposure to that substance.

(c) Plaintiffs' motion to exclude injury or disease to other parts of the body is denied as too broad.

(d) Motion to preclude evidence that plaintiff was injured or suffered chest disease other than his claimed asbestos-related disease unless the defendants first assure the Court that they will

and that they do prove by competent evidence that such injury or other disease is the proximate cause of plaintiff's claimed condition of ill-being is allowed.

(e) Plaintiffs' motion to exclude evidence of the use of tobacco products unless the defendants first assure the Court that they will and thereafter do prove by competent evidence that the tobacco use is the proximate cause of plaintiff's claimed condition of ill-being is allowed.

(f) Plaintiff's motion to preclude evidence of any convictions is allowed unless the matter is first brought to the attention of the Court.

Paragraphs (g) on use of alcohol, (h) on church activities, (i) on collateral sources, (j) on income tax effects on judgments, (k) on settlements, (l) on the filing of any other claims or lawsuits, and (m) on the health or causes of death of plaintiff's family members or relatives, are all allowed.

All paragraphs of this order are subject to reconsideration if counsel feel that new or different developments which occur during the trial of the case require a different ruling; however, the Court again cautions counsel that any reconsideration should first be brought to the attention of the Court and that these orders should be obeyed until a different ruling, if any, is obtained.

DATED this 7th day of October, 1988.

ENTER: /s/ CHARLES W. CHAPMAN
CIRCUIT JUDGE

STANDING ORDER, ASBESTOS PERSONAL-INJURY CASES

(State of Illinois — County of Madison —
Third Judicial Circuit Court)

(Filed March 16, 1989)

(IN RE: ASBESTOS CASES)

HISTORY OF THE PROBLEM

In 1986 a large number of asbestos cases were filed in Madison County, Illinois. The Court was fortunate enough to establish a system which it hoped would lead to the quick and reasonable resolution of the many cases on file and to be filed at later dates. Unfortunately, certain shifts in the relationship of the various defendants and certain changes in defense posture by certain of the defendants have made the system not as effective as originally intended. Had the posture of the defendants not changed, and had the alliances heretofore forged remained intact, the system would have worked. Given the new circumstances referred to above, the Court feels that it is incumbent upon it to change its method of handling these disputes, in order to effectively address the large number of cases pending. To continue hearing the cases singularly (one at a time) the Court would need one hundred new judges for the next four year. Obviously, that cannot be accomplished. Without a shift in posture by the Court using existing Court personnel, it would be well into the 2100's before these cases would be resolved. Clearly, that timing is unacceptable to everyone, and certain changes must be made.

OBJECTIVES

It is the objective of the Court to encourage a fair, expeditious and inexpensive resolution to the large

number of cases pending in Madison County, Illinois. In an effort to achieve this goal with the limited judicial resources that are available, the Court has determined that it must establish a new case-management plan to permit the parties to obtain reasonably necessary documents and information without imposing undo burdens. It is hoped that this will permit the parties to evaluate their cases, reach early settlements and prepare those unsettled cases for trial. The essential components of the case-management plan shall include:

1. Standardization of pleadings and discovery, so that the parties can obtain the necessary information to evaluate cases for settlements or to prepare them for trial at minimum costs.

2. The conducting of periodic pre-trial conferences to resolve pre-trial management problems and to establish reasonable discovery cutoff dates.

3. The clustering, ordering, and firm scheduling of cases for both pre-trial procedure and trial.

4. The coordination of all problems through the use of liaison counsel, who it is hoped can assist the Court in avoiding duplication, containing, costs, and expediting disposition.

DOCUMENTS AND FILING PROCEDURES

Since most cases have already been filed, the Court, on its own Motion, will establish a *Master Calendar,* which will be supplemented from time to time as there are new or additional filings. The *Master Calendar* shall be applicable to all-filed asbestos cases and will be subscribed to by all Judges in this Circuit hearing asbestos

cases. The Clerk of the Circuit Court of Madison County shall have the original of this Order and shall, with the Court's assistance, establish the *Master Calendar*, and a copy of the *Master Calendar* shall be deemed to be part of the record in each and every case.

The Clerk shall also establish a *Document Register* which will be numbered with each document filed therein and which shall be periodically updated as there are new or additional filings. A *Document Register* is registration of all items of proposed documentary evidence (evidentiary depositions included) which counsel intends to use at one or more trials in the asbestos litigation. The document needs only be registered one time. It does not have to be registered for every case or every group of cases. Once the document is in the Register, it is fully disclosed and need not be additionally disclosed in every case. Each party shall be responsible to maintain and update its own *Document Register.* The original *Document Register* will be available for inspection by any party by making arrangements with the Clerk of the Court for a convenient time in which to review the *Document Register.*

New or revised documents may be made a part of the *Document Register* upon the party requesting the addition to the *Document Register* filing a Motion with the Court for leave to file the new filing and serving all parties of record with a copy of said Motion and a copy of the proposed additional documents. The Court will not set a hearing date unless there are serious objections to the document being made a part of the Register; such objections must be raised in writing within five (5) days of the filing. The Court will rule upon the addition or set the matter for hearing.

Once the Court has approved the addition of the new or revised documents to the Court's Document Register,

the moving party shall have the responsibility to file said document with the Court's *Document Register* and to obtain a *Document Register* number and to advise all attorneys of record of the addition to the Register, the new number, and to serve a copy of the new document upon each of the attorneys of record. Counsel will, before every trial or cluster of trials, file a single-page pleading setting forth the *Document Register* number of the document they intend to use at trial. Initially, the Court will establish April 25 and 26, 1989, as the initial filing date for the *Document Register*, and the Court directs that all counsel file, on or before those dates, all items they want included in the *Document Register* for the initial trials. The Court will spend the days of April 25 and 26 in setting up the initial *Document Register*. All documents to be filed for the initial filing and setting up of the *Document Register* should be filed with the Court at 2000 Edison Avenue in Granite City, Illinois. The Court is, specifically, directing that all items be filed there for the *Document Register*, so that the initial *Document Register* can be manually completed, and it will then be transferred to the Clerk's Office for computerization. Everyone will receive a copy of the initial *Document Register*. Once the number is established, future disclosures to opposing counsel of what items of documentary evidence of any nature that counsel may intend to use in his/her case, can be done merely be referring to the number of the document thus, cutting down on hundreds of pages worth of photocopying and added expense to everyone.

The Court will establish a *Master Pleading File*, which will have standard pleadings, which the Court hopes counsel will adopt, by merely filing a single sheet of paper with the appropriate case hading title on it and adopting the number of pleading counsel wishes to use. In the event the *Master Pleading File* does not have the

pleading counsel deems necessary, the Court requests that counsel assist the Court by proposing to the Court the addition of a new *Master Pleading* for that particular motion and/or filing, so that we can efficiently as possible use single sheets of paper for filings, instead of multi-page documents.

It is the Court's desire to eliminate as much of the paperwork as is possible by the establishment of this *Master Pleading File*. Copies of the *Master Pleading File* will be made available to each of the law offices involved in this litigation, and when a new *Master Pleading* is developed, all law offices will be given copies of the new *Master Pleading File*. It is clear that the Court is not going to be able to envision every possible circumstance that may require a pleading; and, therefore, some custom pleadings will have to be done, but the Court hopes that that can be kept to a minimum.

The Court may require counsel for the various parties to reconstruct each individual file by using *Master Pleading* numbers as to the various pleadings they have filed on behalf of their respective clients in the cases. The Court does not envision this to be a monumental task because the pleading, in reconstructing the filing, will only contain the numbers of the pleadings filed, the dates of the pleadings having been filed and orders entered thereon. This will be done on a case-by-case basis, if it is necessary to assist the Clerk's Office, which at this time is laboring with monumental paper problems.

COMPLAINT AND ANSWER

While most of the complaints are already on file, the Court thinks it is necessary to have standard complaints, which will be the only complaints allowed to be

filed, and with this Order does establish standard complaints which can be referred to by number by the person filing the same. When serving a defendant, plaintiffs only serve a summons and a single sheet advising the defendants of the complaint form which applies to that defendant. The defendants shall file an answer to the plaintiff's standard complaint along with affirmative defenses which are also prepared and part of the Court's standardized pleadings, and the defendant may file such answer and affirmative defenses by merely referring to he number of pleading on a single sheet of paper. If the affirmative defenses which are raised are not a part of affirmative defenses contained in the *Master Pleadings*, said affirmative defenses will have to be filed in specificity in the first responsive pleadings. All parties are encouraged to use the master form affirmative defenses in as many cases as is possible.

If a defendant wishes to challenge the jurisdiction of the Court, the defendant needs to file such challenge by adopting the master pleading applicable to jurisdiction challenge and filing a one-page pleading setting forth the number of the pleading it seeks to adopt and by adding any additional it needs or thinks it needs to add. The Court will then set the matter for hearing and great latitude to be given to all counsel at the hearing, keeping in mind that counsel are encouraged to use the one-page standardized pleadings, and such pleadings are not meant to be restrictive and bind counsel. It is the objective of the Court to cut down on paperwork but not to limit counsel in their legitimate pursuit of a jurisdictional challenge.

It is not necessary for plaintiffs to respond to affirmative defenses enumerated by defendants, whether said defendant requests a reply or not, and all affirmative defenses shall be deemed to be denied by the plaintiffs.

It is the purpose of the Court, in adopting such a rule, to eliminate substantial unnecessary paperwork. Clearly, if there are specific circumstances which require pleadings above and beyond this general Order, in terms of denying affirmative defenses, the Court will upon application entertain a hearing to determine the propriety of such filings.

It shall not be necessary for cross-defendants to answer cross-complaints, and all allegations of cross-complaints shall be deemed to have been denied by cross-defendants, unless a cross-defendant files a response admitting or otherwise indicating something else. Again, this is meant to cut down on the great amounts of paperwork.

DISCOVERY — PLAINTIFFS' INTERROGATORIES

1. Plaintiff shall file with the Court's Master Pleading File a joint set of interrogatories by filing an endorsement of the form interrogatories.

2. Each defendant shall file with each individual firm one set of answers to plaintiffs' master set of interrogatories.

3. Thereafter, defendant shall be obligated to update said answers as additional information may become known to the defendants without additional request for new information. The Court is well-aware of the Illinois Supreme Court Rule, specifically, subparagraph (e) thereof, but because of the large number of cases involved here, and the great burden of additional paper, the Court feels it must do everything possible to lessen everyone's paper burden. It is, therefore, an affirmative obligation in these cases for counsel to update their answers to interrogatories, if new information becomes known. This

applies to both plaintiffs and defendants. If the information is not updated, the Court will consider appropriate sanctions.

DEFENDANTS' INTERROGATORIES TO PLAINTIFFS

1. Defendants shall file with the Court's *Master File* the standard set of interrogatories now being used by agreement of all parties.

   a. Each plaintiff shall file one set of answers to the master set regarding liability and shall update those answers without additional request as new information becomes known.

   b. Plaintiff shall further answer all questions regarding plaintiff's personal data and employment history in each of the individual files and shall have the same updating obligation.

2. Supplemental interrogatories may be served by any party as to matters and issues not covered by the master set of interrogatories.

DISPOSITIVE MOTIONS

1. No defendant may serve a dispositive motion based on lack of product identification until the case has been on the active docket for nine (9) months. If no product identification exists as to a particular defendant by that time, and the conspiracy cause of action does not relate to the particular defendant, the plaintiff and the defendant will be encouraged to agree to a stipulation of dismissal as to that particular defendant.

2. If any party believes special circumstances exist, which merit the serving of a dispositive motion on product identification prior to the date as out-

lined above, that party may file a motion, pursuant to the requirements set forth within the Illinois Civil Practice Act. However, dispositive motions filed in what the Court determines to be an untimely or frivolous fashion will result in the assessment of fees and costs.

3. All motions and responses must be served on all parties of record.

AUTOPSY

1. Defendants are entitled to have an expert of their choice analyze whatever tissue specimens, blocks or slides are created during the autopsy, and such will be preserved for defendant's experts use.

ENTRY OF ORDERS

1. Counsel for all parties are encouraged to make use of stipulated orders, for the entry of all non-controversial orders, or orders repetitive or previously entered by the Court in other asbestos cases.

2. Stipulated orders shall not be used with respect to a matter known to be controverted or with respect to novel, legal or factual situations not previously addressed by the Court.

USE OF DISCOVERY AND DEPOSITIONS FROM OTHER CASES

1. Various employees of parties, former employees of parties, witnesses with knowledge, and expert witnesses have been deposed in other cases involving alleged asbestos-related personal injuries. In addition, there has been extensive

document discovery conducted in other cases involving alleged asbestos-related personal injuries. To avoid undue witnesses, each defendant and plaintiff, who has not already done so, shall file, within sixty (60) days from the date hereof, a list of all depositions taken of employees with knowledge, and expert witnesses, and list the caption and docket number of the case, the jurisdiction where the case was pending, and the dates of each deposition. Each defendant and plaintiff shall make such deposition available to other counsel. Counsel for any party may inspect or have copies, at his expense and at reasonable cost, any transcript which he does not already have in his possession, custody or control.

2. Any party seeking to use any portion of such prior deposition as substantive evidence at trial shall, no later than sixty (60) days before a scheduled trial date, provide opposing counsel with a listing of: (a) the depositions that such party wishes to use; (b) the parties named in the lawsuit in which the deposition was taken; (c) the parties against whom each deposition will be used; and (d) the specific issues on which the deposition will be offered as substantive evidence. Each party will then review the deposition and advise opposing counsel whether there is any objection to use the proffered deposition, in lieu of a new deposition of the witness. Any party objecting to use of the deposition shall file a statement setting forth grounds within ten (10) days of receipt of such listing. If no objection is made within ten (10) days, such deposition can be used as if noticed and taken in any of the asbestos cases filed in Madison County, Illinois,

against those parties or their successors in interest who were present at the prior deposition. If there is an objection, the Court will determine on motion of the party seeking to use it, whether the deposition may be used in this litigation in lieu of a new deposition of the witness. If any portion of such prior deposition is introduced as substantive evidence at trial, the party introducing such evidence shall not oppose a jury instruction that limits the applicability of such evidence to the parties listing in (c) above and to the issues listed in (d) above.

The standards of review for determining use at trial of the prior deposition shall be the Illinois Civil Practice Act and Illinois Supreme Court Rules and may include showing of good cause, relevance, economy of efforts by the Court and counsel, and no substantial prejudice of the party opposing its use, and the factors set forth herein (4). The burden of persuasion shall rest with the parties seeking to use at trial prior deposition testimony taken in a case outside of this litigation.

In determining whether prior depositions may be used, the Court may consider the following factors, among others: (a) the identity of the deponent; (b) the date of the deposition; (c) the nature of the case, where the deposition was taken; (d) the nature of the pending case, and, particularly, the place of employment, illness, product exposure, and duration of exposure of the plaintiff to asbestos products; (e) the purposes for which the deposition was taken; (f) the deponent's area and extent of corporate responsibility, if any; (g) the deponent's knowledge, at the date of the depositition, of the matters about which he was interrogated; (h) the deponent's knowledge, at the present time, of the matter about which he was or is likely to be interrogated; (i) the adequacy of the opportunity for cross-examination, particularly in light of the date, nature,

and purposes of the prior deposition; (j) the issues for which evidentiary use of the deposition is sought in this litigation; (k) the degree of prejudice to the party opposing use of the prior deposition; and (1) the extent of compliance with the procedural requirements of the jurisdiction where the deposition was taken.

TRIAL SCHEDULE

Asbestos cases' files shall be subject to being on file at least twelve (12) months prior to being brought to trial, unless there are extraordinary circumstances which justify deviation from this system. Previously-filed cases will be taken up by the Court in clusters based upon a number of common factors, and based primarily upon the disease process, beginning with the more serious and proceeding ultimately to the less serious. The Court will attempt to schedule three plaintiffs' groups each month and will alternate scheduling those groups, so that plaintiffs' groups are exposed to the already-approved judicial personnel in an effort to be as fair as possible with all parties concerned.

The initial clustering of cases shall include no more than three (3) cancer cases from each plaintiff group. The Court will use several months in clustering cancer cases in lots of no more than three (3), in an effort to ease everyone into the new system because it is clear preparing one (1) case, rather then twenty-five (25) cases, or three (3) cases rather than fifty (5) cases, is much easier. For that reason, there may be several months of cancer clusters before the first clustering of asbestosis cases, which will be grouped in clusters of no more than twenty-five (25). Between the clustering of the cancer cases and, perhaps, one cluster of asbestosis cases, it is the hope that the 1989 calendar year will be fully used. In 1990 the clusters will be alternated as much as is possible.

The Court is mindful that the pleural change cases, which will be clustered in groups of fifty (50), will more than likely have to take a back seat in the process because those cases simply do not embody the allegations of the serious injuries as the other cases. The Court will do everything within its power, after the initial June setting of 1989, to have its calendar in place for the next twelve (12) months, so that counsel and clients will have an accurate idea of what cases will be reached and when. Because of the large number of cases, the Court is going to impose certain time restrictions on the presentation of the serious type cases, keeping in mind not only the types of cases from injury standpoint, but also keeping in mind the number of claimants being addressed in each of the cases. Prior to addressing the question of length granted to each side to present their case, the Court must first address itself to discovery parameters and limitations, some of which are inapplicable because many cases are already beyond this stage.

a. Plaintiff's answers to interrogatories shall be served on opposing counsel at least 240 days prior to the trial date specified on the master calendar.

b. Plaintiff shall provide medical authorizations to the defendant's records depository when serving answers to the interrogatories referred to above, and, in any event, it shall be served at least 240 days prior to the trial date.

c. All parties shall serve adverse parties with lists of fact witnesses, not expert witnesses, 120 days preceding the date the matter is set for trial.

d. All parties shall serve adverse parties with witness lists of expert witnesses ninety (90) days

preceding the date the matter is set for trial, listing only those experts they expect to testify at trial. All expert discovery must by fully completed no later then sixty (60) days before trial.

e. Plaintiff shall provide the defense liaison counsel assigned to that case with all tissue, slides, and x-rays plaintiff intends to use at trial with notice to the assigned defense counsel 120 days before the trial date.

1. The defense liaison counsel shall coordinate activities for purposes of sharing the material.

2. In the event cooperation cannot be achieved among the defendants in this regard, the Court will meet informally in chambers with the attorney involved and assign time limits for sharing the material.

3. Defense liaison counsel will be appointed by the Court in each case, and such appointments will be set forth on the Court's Master Calendar, with the Court attempting to pass the liaison responsibility equitably among all of the defense counsel.

f. Defendants shall return to plaintiff's attorney any and all items provided to defendant attorneys, pursuant to paragraph e, within thirty (30) days of the date the tests are completed, except the material lost through destructive testing. However, destructive testing occur by Court Order

g. Plaintiff shall provide the defendants' depository within thirty (30) days of receipt experts' medical report(s), including any opinion of diagnosis and prognosis, as well as a statement of materials reviewed, significant medical findings, tests per-

formed, results of said tests, interpretation of said tests, interpretation of each physical exam, if performed, and an opinion on whether or not any abnormality found is related to asbestos exposure.

h. Defendants shall provide plaintiffs with their medical experts' report(s) which will set forth the same type of information as plaintiffs are required to provide in plaintiffs' experts report. Each report is to be provided to the adverse party within thirty (30) days after receipt of the report.

i. No medical expert shall be allowed to testify, unless a report has been previously provided, pursuant to the requirements of this Order, unless the Court, based upon good cause, allows said expert to testify without a receipt having previously been filed.

j. All discovery of non-medical fact witnesses shall be completed sixty (60) days preceding the date the matter is set for trial.

k. Unless otherwise stated herein or ordered by the Court, the independent medical examination of the plaintiff requested by the defendant shall be completed at least ninety (90) days prior to the trial date, unless leave is sought to perform the same.

l. All discovery of experts (medical or otherwise) shall be completed sixty (60) days preceding the trial date.

m. An economist listed by a party need only provide one detailed report of opinions and theories and/or submit to one deposition regarding same. Thereafter, said economist need only provide an

opinion regarding the amount of losses claimed by each plaintiff. If new theories are developed, a new report and/or deposition must be provided to the adverse party.

n. If any deadline is missed, it shall be the responsibility of the party who missed same to file a motion for an extension, unless stipulated to by the adverse party. Such extensions, if close to trial date, will be frowned upon, whether by stipulation or not.

o. Discovery depositions of medical treating physicians are limited to three (3) hours.

p. Discovery depositions of expert medical witnesses are limited to two (2) hours.

q. Discovery depositions of state-of-the-art experts are limited to six (6) hours.

r. Discovery depositions of economists are limited to two (2) hours.

s. Discovery depositions of the plaintiff are limited to three and one-half (3½) hours.

t. Discovery depositions of co-worker identification witnesses are limited to two (2) hours.

u. Evidentiary depositions are limited as follows:

a. State-of-the-art witnesses
plaintiff, two (2) hours
defendant, two (2) hours

b. Treating physicians
plaintiff, two (2) hours
defendant, two (2) hours

c. Non-treating medical
plaintiff, 1 one-half (1½) hours
defendant, 1 one-half (1½) hours

d. Economist testimony
plaintiff, 1 one-half (1½) hours
defendant, 1 one-half (1½) hours

e. Co-worker ID witnesses
plaintiff, 1 one-half (1½) hours
defendants, 1 one-half (1½) hours

v. Motions to expand the testimony times in evidentiary depositions may be filed and will be considered individually in all itinerant-worker cases.

w. Just as evidentiary depositions are limited in length of time, so, too, will be live witnesses. Their testimony will be limited to the times prescribed above, and variance will only be permitted by advance motions to extend the time.

x. Defendants are entitled to a single independent medical examination, pursuant to Supreme Court Rule 215 and must be completed ninety (90) days prior to trial, and the report therefrom furnished at least sixty (60) days prior to trial.

TRIAL PROCEDURE AND LIMITATIONS

Plaintiff shall have two (2) lead counsel, and that attorney, and one other, shall be the counsel who handle the trial for the plaintiffs. If the cluster of cases are from more than one plaintiff group, the Court shall permit a singular lead counsel from each plaintiff group.

The Court will appoint three (3) lead counsel from the defendants in each case, and these counsel shall among themselves divide up the trial responsibility and time, keeping in mind the need for basic fairness for all defendants. In the event that counsel are unable to agree with lead counsel as to the distribution of the allotted time, the Court will make the decision.

VOIR DIRE

The Court intends to take a more active part in the jury-selection process to, hopefully, standardize and speed up the selection process: the Court will ask the questions attached hereto as Exhibit A in panels of twelve (12). The Court will then permit questioning of twelve (12) juror panels by plaintiffs' and defendants' counsel. Each side shall have thirty (30) minutes per panel of twelve (12). The intention of the Court is to get through sixty (60) jurors, or as many as are needed to pick the jury. The jury will actually be selected by counsel out of the presence of the jurors by the tendering back and forth of panels of four until the jury of *twelve* (12) and *two* (2) alternates is selected. Counsel shall have the advantage of having the questionnaires of the prospective jurors at their disposal, and the computer printouts prepared by the Jury Submission.

OPENING STATEMENTS

Time will be assigned to each side for opening statements, pursuant to Chapter 110, Section 235. The Court will adjust the time, pursuant to the clusters and the number of cases in each cluster. It is also the duty of liaison counsel to divide the time. In the absence of agreement, the Court will divide the time.

CLOSING STATEMENTS

Time will be assigned to each side. Again, the Court will adjust the time, pursuant to the clusters and the number of cases in each cluster. Again, it is the duty of liaison counsel to divide the time. In the absence of agreement, the Court will divide the time.

This Court is certain that it has overlooked many things that will have to be addressed at a later time, some individually and some in a group fashion. The

Court is reserving, of course, its prerogative to address those issues and any others that need addressing from time to time. It is hoped that all counsel and clients understand the enormity of this task and the Court's desire to address as many of the cases as it can reasonably ensuring fairness to all concerned.

All Orders of the Court heretofore entered, which are not inconsistent with this Order, will remain in full force and effect. To the extent that the Orders are inconsistent, this Order shall control.

ENTERED THIS 16TH DAY OF MARCH 1989.

/s/ Paul Riley

GENERAL ADMINISTRATIVE ORDER 089-13

(State of Illinois — County of Madison — Third Judicial Circuit Court)

(Filed April 7, 1989)

The following Associate Judges' assignments shall become effective April 10, 1989, and until the further order of the Court.

JUDGE J. LAWRENCE KESHNER Granite City/Collinsville
All Granite City and Collinsville traffic, misdemeanor and ordinance cases, jury and non-jury, and all non-jury small claims cases in those areas; will hold court in Granite City on Mondays, Tuesdays, Wednesdays and on Friday mornings, and in Collinsville on Thursday of each week. This Judge is assigned to Edwardsville on Friday afternoons for small claims cases and citations and will also hear specially assigned cases from the Supervising Judge of the Associate Division and from the Chief Judge. This Judge will conduct jury trials in Edwardsville during the last jury week of each month.

JUDGE GORDON E. MAAG Granite City, Law Division:
This Judge shall work with the Honorable Paul E. Riley and subject to his supervision in the exercise by Judge Riley of the general supervisory and administrative authority previously delegated to him to implement pre-trial discovery, resolve procedural issues and schedule trials in all cases based on asbestos claims pending in the Third Judicial Circuit; Judge Maag shall also perform such other duties and assignments as may be given to him by Judge Riley and the Chief Judge with respect to both the asbestos litigation and the management of Judge Riley's "L" docket, and will hear such other cases as may

be assigned to him from time to time by the Chief Judge.

It is further ordered that this order be filed in the office of the Circuit Clerk of the Circuit Court of Madison County, Illinois, and that said order shall be made available to the members of the bar and public.

ENTER this 7th day of April, 1989.

/s/ P.J. O'NEILL
Chief Judge

SUPPLEMENT TO STANDARD ORDER

(State of Illinois — County of Madison —
Third Judicial Circuit Court)

(Filed July 14, 1989)

(IN RE: ASBESTOS LITIGATION)

On March 16th, 1989 this Court entered its standing order regarding asbestos personal injury cases. As reflected in that order numerous asbestos cases have been filed in Madison County and due to the high volume of litigation of this type it has been necessary to prepare a standing order governing those cases.

Recently an issue has been raised by the parties with respect to redeposing persons who either are plaintiffs in asbestos cases or co-workers in asbestos cases. Some of these individuals have previously been deposed either as a plaintiff or co-worker and the parties are now seeking to redepose these individuals due to their status as product identification witnesses who were co-workers of individual plaintiffs. Since many of these prospective deponents have been identified in numerous cases as product identification witnesses the potential exists for an individual to be redeposed tens if not hundreds of times. The Court believes that this would be an unworkable situation and a burden not only to the parties involved, but to the individual who would be forced to undergo deposition examination on a repeated and regular basis. The Court further finds that this is an unreasonable burden. Accordingly, this supplemental order is being entered in an attempt to alleviate this problem.

After considering the argument of counsel for both the plaintiff and defendants the Court has identified

three situations which are at issue. These situations are as follows:

1. The situation wherein a prospective deponent is both a plaintiff and a product identification co-worker and has previously been deposed.

2. The situation where a prospective deponent is a co-worker or plaintiff only in any of the asbestos litigation and has not previously been deposed.

3. The situation wherein the prospective deponent is either a plaintiff or a product identification co-worker and was deposed under the category of a plaintiff or under the category of a product identification co-worker as provided for in the previously entered standing order.

After due consideration of the arguments of counsel and the issues at hand and further after a recognition of the extreme burden that would be posed by repeated depositions of persons falling in the above listed categories the Court orders as follows:

1. If a prospective deponent has previously been deposed either as a co-worker or as a plaintiff, and if the parties seeking to redepose that witness has had the opportunity to participate in a discovery deposition with the witness, leave of Court must be obtained in order to redepose the witness. In seeking leave of court the party seeking to redepose the witness must identify the subject matter upon which they wish to inquire of the witness, show good cause why that subject matter was not inquired into previously, and specify the particular fact or facts which they seek to obtain through the additional discovery deposition.

2. If a party has not been previously deposed either as a plaintiff or as a co-worker it is the obligation of the plaintiff to identify that case or those cases in which

the plaintiff intends to utilize the prospective deponent as a product identification co-worker. If the plaintiff's attorney fails to identify a prospective deponent as a product identification co-worker witness prior to that individual's deposition then the plaintiff will be barred from calling that individual as a product identification co-worker witness unless prior to trial and with leave of Court for good cause shown the plaintiff identifies the individual as a product identification co-worker witness and shows good cause why he was not previously identified as a product identification co-worker witness. If the Court grants leave to the plaintiff's attorney to supplement his list of product identification co-worker witnesses the defendants shall have the opportunity to redepose if they choose the witness so identified.

3. If a prospective deponent has not previously been deposed and is both a plaintiff in the Madison County asbestos litigation and is listed as a product identification co-worker witness, the time periods specified in the March 16th, 1989 standing order restricting the time of depositions for plaintiffs and for co-worker witnesses shall be combined.

4. For each individual case in which a product identification co-worker witness is identified the time period specified in the standing order shall be enlarged by 30 minutes per individual case in which the individual is identified as a product identification co-worker witness.

It is the hope that the plaintiffs will only identify co-worker product identification witnesses they actually intend to use. In this fashion the interests of the parties in obtaining pre-trial discovery will be satisfied and at the same time the burden upon the parties of attending repeated discovery of the same witness and the burden upon the witness himself in attending repeated discovery depositions will be alleviated.

ENTERED this 14 day of July, 1989.

/s/ P. Riley, JUDGE

GENERAL ADMINISTRATIVE ORDER R89-26

(State of Illinois — County of Madison — Third Judicial Circuit Court)

(Filed July 28, 1989)

The following assignments of Associate Judges and courtroom assignments shall become effective September 5, 1989, and until the further order of the Court.

JUDGE GORDON MAAG GRANITE CITY/LAW DIVISION

This Judge shall work with the Honorable Paul E. Riley and subject to his supervision in the exercise by Judge Riley of the general supervisory and administrative authority previously delegated to him to implement pre-trial discovery, resolve procedural issues and schedule trials in all cases based on asbestos claims pending in the Third Judicial Circuit; Judge Maag shall also perform such other duties and assignments as may be given to him by Judge Riley and the Chief Judge with respect to both the asbestos litigation and the management of Judge Riley's "L" docket, and will hear such other cases as may be assigned to him from time to time by the Chief Judge or the Supervising Associate Judge.

JUDGE ROBERT HENNESSEY GRANITE CITY/COLLINSVILLE

All Granite City and Collinsville traffic, misdemeanor and ordinance cases, jury and non-jury, and all non-jury small claims in those areas; will hold court in Granite City on Mondays, Tuesdays, Wednesdays and on Friday mornings, and in Collinsville on Thursday of each week. He will also hear specially assigned cases from the Supervising Judge of the Associate Division and from the Chief Judge. This Judge will conduct jury trials in Edwardsville during the last jury week of each month.

JUDGE ELLAR DUFFWILLIAMS — EDWARDSVILLE/ COURTROOM NO. 12

All Juvenile matters, all unscheduled Probate matters and all uncontested Probate matters; and, cases specially assigned by the Chief Judge and the Supervising Judge of the Associate Division.

JUDGE LOLA MADDOX — ALTON/WOOD RIVER

This Judge shall hear all Alton and Wood River area traffic and misdemeanors, both jury and non-jury, and non-jury small claims cases; shall preside over hearings at the Alton Mental Health Center on Thursday morning. During the last jury week each month will preside over jury trials in Edwardsville.

JUDGE DANIEL STACK — EAST ALTON CIVIL DIVISION

All LM & ED jury and non-jury cases. CH and MR cases assigned by the Supervising Judge. East Alton traffic and misdemeanor cases. Small claims jury. One day a month will preside at the Highland Court.

JUDGE GEORGE FILCOFF — FAMILY DIVISION/ EDWARDSVILLE/COURTROOM #202

JUDGE JONATHAN ISBELL — FAMILY DIVISION/ EDWARDSVILLE/COURTROOM #203

Weddings each Friday afternoon.

JUDGE WENDELL DURR — EDWARDSVILLE/COURTROOM #15

All family and support cases including orders of protections and adoptions; covering IV-D dockets every Tuesday. Family Citations all day each Monday. Preside over Edwardsville traffic and misdemeanor cases set on Wednesdays. Will assist Family Division on Friday mornings; and will preside over the Edwardsville Small Claims and Citations on Friday Afternoon.

JUDGE J. LAWRENCE KESHNER — EDWARDSVILLE/ COURTROOM #209

Will assist Criminal Division on Monday mornings with pleas; probation revocations on Thursday morn-

ings; preliminary hearings on Friday mornings and other matters assigned by the Presiding Judge in the Criminal Division.

He will also assist the Associate Jury Trials with the Associate Jury Trials on the last jury week each month; will preside in Bond County two Wednesdays each month.

JUDGE MICHAEL MEEHAN EDWARDSVILLE/ROOM #402

Supervising Judge of the Associate Division. Will hear matters specially assigned by the Chief Judge; will preside over all DUI cases, preliminary injunctions and temporary retraining orders.

Assist in cases from the East Alton Area Court.

It is further ordered that this order be filed in the office of the Circuit Clerk of the Circuit Court of Madison County, Illinois, and that said order shall be made available to the members of the bar and public.

DATED: July 27, 1989

/s/ Charles Romani, Jr.
Chief Judge

AFFIDAVIT OF ROBERT A. McOMBER IN OPPOSITION TO PERMITTING ANY AWARD OF PUNITIVE DAMAGES AND IN SUPPORT OF OWENS-CORNING FIBERGLAS CORPORATION'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, FOR NEW TRIAL OR REMITTITUR

(State of Illinois — County of Madison — Third Judicial Circuit Court)

(Dated December 19, 1990)

(IN RE: ASBESTOS LITIGATION CASES FILED BY BARON & BUDD; HARRY RENEAU, et al., CLARENCE WOODWARD, et al., CLIFFORD DAVIDSON, HERMAN DAVIS, et al., CLARENCE GRANGER, et al., GEORGE GWALTNEY, et al., LEROY JOHNSON, et al., JOHN KOCHAN, HENRY STEPANICH, et al., Plaintiffs, vs. A.P. GREEN, et al., Defendants — No. 87-L-870, No. 87-L-498, No. 86-L-1618, No. 86-L-1653, No. 86-L-1651, No. 86-L-1487, No. 86-L-1574, No. 86-L-1650, No. 86-L-874; Lead Case: *Greco*)

Robert A. McOmber, being duly sworn, deposes and states as follows:

1. I am Counsel–Litigation, employed by Owens-Corning Fiberglas Corporation ("OCF") in its Law Department in Toledo, Ohio.

2. Based upon a search of presently existing corporate files and information obtained during interviews with various employees of OCF, I am familiar with the products which are or were manufactured, sold and distributed by OCF.

3. In May 1958, OCF purchased the Kaylo Division from Owens-Illinois and first became a manufacturer of a high temperature asbestos-containing insulation product, which product is the focus of plaintiffs' claims. OCF discontinued the manufacture of asbestos-containing Kaylo in November of 1972.

4. OCF no longer manufactures or distributes high temperature asbestos-containing insulation products.

5. In the course of the performance of my duties in the OCF Law Department, I, and other OCF employees at my direction, have maintained records pertaining to the status of litigation, pending and concluded, against OCF.

6. From the litigation records, I have determined that OCF is currently a defendant in asbestos personal injury lawsuits in all 60 states, the District of Columbia, Guam and the Virgin Islands. There are 84,570 cases pending against OCF, as of November 30, 1990, in which plaintiffs seek damages for asbestos-related injuries and conditions allegedly arising out of OCF's single course of conduct of manufacturing and distributing asbestos-containing high temperature insulation products allegedly without adequate warning. (Included in that number are a handful of cases brought by OCF plant-workers alleging injuries which arose out of the manufacture of asbestos-containing products.) Approximately 55,193 additional such cases have already been resolved as of November 30, 1990, the vast majority through settlement. Virtually all of these cases include claims for punitive damages.

7. For the year 1990, new asbestos-related personal injury lawsuits were being filed against OCF at an average rate of 1,962 per month (21,582 cases for the period January 1, 1990, through November 30, 1990).

8. I have also ascertained from OCF's records that the following substantial punitive damages jury verdicts have been awarded against OCF in favor of plaintiffs in lawsuits in which damages were sought for injuries and conditions allegedly arising out of exposure to asbestos-containing products manufactured and distributed by OCF:

CASE NAME	*PUNITIVE DAMAGES AWARD*
Jennings Davis v. *OCF* Monongalia County, West Virginia No. 86-C-763	$ 280,000
Robert J. Gizzi v. *OCF* United States District Court, Southern District of Ohio No. C-1-84-961	$ 2,000,000
William L. Schoenian, et al. v. *OCF* Circuit Court of Ohio County, West Virginia No. 87-C-775-B	$ 3,900,000
Wilbert Watson v. *OCF* Circuit Court, City of Newport News, Virginia No. 12292RC	$ 100,000
Harry Reneau, et al. v. *OCF* Madison County Circuit Court, Illinois No. 87-L-870	$ 5,000,000
William Dunn v. *OCF* United States District Court, District Court of the Virgin Islands, St. Croix Division No. 87-238	$ 25,000,000
Leonard Adams, et al. v. *OCF* Circuit Court of Monongalia County, West Virginia No. 86-C-764	$ 630,000
Charles Barnes, et al. v. *OCF* Circuit Court of Monongalia County, West Virginia No. 86-C-764	$ 3,750,000

Documents substantiating the aforementioned punitive damage awards in the *Davis*, *Gizzi* and *Schoenian* cases are attached to this affidavit as Exhibits A through C. OCF is currently in the process of collecting the underlying documentation regarding the punitive damage awards most recently imposed in the *Watson*, *Dunn*,

Adams, and *Barnes* cases, and plans to supplement the record upon receipt of these documents.

9. In *Davis* v. *OCF*, a final judgment was entered confirming the jury's punitive damages award of $280,000 against OCF. Plaintiff Davis, a pipefitter and plumber, alleged that he contracted asbestosis and lung cancer as a result of his exposure to OCF asbestos-containing products from late 1958 to 1979. The case has since been settled by OCF.

10. In *Gizzi* v. *OCF*, the jury imposed a punitive damages award of $2 million against OCF. The matter was eventually settled by OCF and the settlement included a payment of $1.2 million in punitive damages. Plaintiff Gizzi, an insulation mechanic, alleged that he contracted asbestosis as a result of exposure to OCF asbestos-containing products from August 1965 until December 1982.

11. In *Schoenian, Harler and Tusic* v. *OCF*, a case involving three plaintiffs, the jury imposed a punitive damages award of $3.9 million against OCF. Plaintiff Schoenian, an insulator and painter, alleged that he contracted asbestosis as a result of his exposure to OCF asbestos-containing products from 1958 to 1982; plaintiff Harler, a painter, alleged that he contracted asbestosis as a result of his exposure to OCF asbestos-containing products from 1958 to 1987; and plaintiff Tusic, an insulator, alleged that he contracted lung cancer as a result of exposure to OCF asbestos-containing products from 1958 to 1986. Recently, OCF negotiated a full settlement with all the plaintiffs, with a substantial amount of the settlement reflecting the jury's punitive damage awards.

12. In *Watson* v. *OCF*, the jury imposed a punitive damages award of $100,000 against OCF and a judgment has been entered accordingly. OCF has filed a notice of

appeal. Decedent Watson, a pipefitter, was alleged to have contracted mesothelioma as a result of his exposure to OCF asbestos-containing products from 1960 to 1978.

13. In *Reneau, et al.* v. *OCF*, a case involving nine plaintiffs, the jury imposed against OCF punitive damages awards of $1 million each for five plaintiffs. A judgment has been entered in the aggregate amount of $5 million, although post-trial motions will be filed and an appeal may still be taken. Plaintiff, Reneau, an insulator, alleged that he contracted asbestosis as a result of his exposure to OCF asbestos-containing products from the late 1950's until the late 1970's; plaintiff Davis, a pipefitter, alleged that he contracted asbestosis as a result of his exposure to OCF asbestos-containing products from the late 1950's until the mid 1980's; plaintiff Kochan, a foreman, alleged that he contracted asbestosis as a result of his exposure to OCF asbestos-containing products from the late 1950's until the 1970's; plaintiff Granger, an insulator, alleged that he contracted asbestosis as a result of his exposure to OCF asbestos-containing products from the late 1950's until the late 1970's; and plaintiff Woodward, a laborer and operator, alleged that he contracted asbestosis as a result of his exposure to OCF asbestos-containing products from the late 1950's until 1972.

14. In *Dunn* v. *OCF*, the jury imposed a punitive damages award of $25 million against OCF and a judgment has been entered accordingly, although an appeal may still be taken. Plaintiff Dunn, an insulator, alleged that he contracted asbestosis as a result of his exposure to OCF asbestos-containing products from the 1950's to 1981.

15. In *Adams, et al.* v. *OCF*, the jury awarded punitive damages of $30,000 to each of twenty-one (21) plaintiffs.

To the best of my knowledge, the judgment has not yet been entered by the court.

16. In *Barnes, et al.* v. *OCF*, the jury awarded punitive damages of $250,000 to each of fifteen (15) plaintiffs. To the best of my knowledge, the judgment has not yet been entered by the court.

17. The same course of conduct has been the subject of repeated requests to juries for punitive damages, some of which have resulted in no sums or only small sums being awarded. In addition to the foregoing, OCF has been subjected to smaller punitive damages awards in the following cases:

CASE NAME	*PUNITIVE DAMAGES AWARD*
Maurice & Jane Barry v. *OCF* Circuit Court Cook County, Illinois Nos. 83L119899, 85L11170	$ 25,000
Lewis & Beverly Coles v. *OCF* Superior Court of New Jersey, Camden County No. L-71009.83	$ 8,000
Giramondo Marcelli v. *OCF* Middlesex County Superior Court, Massachusetts No. 84-1512	$ 25,000

Documents substantiating the aforementioned punitive damages awards are attached to this affidavit as Exhibits D through F.

18. In *Barry* v. *OCF*, plaintiff alleged that he contracted asbestosis as a result of exposure to some or all of defendants' asbestos-containing products from 1949 to 1981, including products manufactured or distributed by OCF. Following the jury's verdict, a full settlement of all damages was negotiated with the plaintiff which was influenced by the jury verdict, and no appeal was taken.

19. In *Coles* v. *OCF*, plaintiff, a pipecoverer, alleged that he contracted asbestosis as a result of exposure to some or all of defendants' asbestos-containing products from 1946 to 1972, including those manufactured or distributed by OCF. Ultimately *Coles* v. *OCF* was reversed on appeal, resolving all plaintiff's claims.

20. In *Marcelli* v. *OCF*, the deceased, a pipefitter, was alleged to have contracted, and died from, mesothelioma as a result of exposure to some or all of defendants' asbestos-containing products from 1946 to 1974, including those manufactured or distributed by OCF. The trial court in *Marcelli* v. *OCF* granted a post-trial motion to set aside the punitive damages award.

21. Thus, OCF has already paid millions of dollars in punitive damages for what was a single course of conduct: the manufacture and distribution of asbestos-containing products.

22. OCF maintains, and has consistently maintained throughout the history of its involvement in personal injury asbestos claims, that there is no justification for the imposition of punitive damages.

23. In addition to punitive damages, several hundreds of millions of dollars in compensatory damages have been paid in approximately 55,193 cases, as of November 30, 1990, either through settlement in advance of trial or upon post-judgment disposition.

24. Litigation defense costs involving asbestos personal injury claims against OCF (excluding sums paid for compensatory damages, punitive damages and in settlements) are well in excess of one hundred million dollars.

25. Further affiant sayeth not.

/s/ Robert A. McOmber
Counsel–Litigation

Subscribed and sworn to before me,
a Notary Public, this 19th day of December, 1990.
/s/ Sheryn L. Hogan, Notary Public, State of Ohio
My Commission Expires Aug. 18, 1994

JURY ORDER

(State of West Virginia — Circuit Court —
County of Monongalia)
(Entered February 28, 1989)

(RONALD DAVIS, EXECUTOR OF THE ESTATE OF JENNINGS DAVIS, ET AL, PLAINTIFFS, vs. OWENS-CORNING FIBERGLAS CORPORATION, FIBREBOARD CORPORATION, THE CELOTEX CORPORATION, AND H. K. PORTER COMPANY, INC., ET AL, DEFENDANTS — CIVIL ACTION NO. 86-C-763)

STATE OF WEST VIRGINIA, SS:
In the Circuit Court of Monongalia County, West Virginia, on the 28th day of February, 1989, the following order was made and entered:

This day, February 28, 1989, came the Plaintiff, Ronald Davis, Executor of the Estate of Jennings Davis, in person and by his attorneys, Theodore Goldberg and Scott S. Segal. Defendant, Owens-Corning Fibreglas Corporation, appeared by their counsel, John Woods, Steven Norde, John Roux and Bruce Welch. Defendant, Fibreboard Corporation, appeared by their counsel, David K. Hendrickson and William Harvard. The Celotex Corporation, Defendant, appeared by their counsel, Kathleen McAllister and John Davis. Defendant, H. K. Porter Company, Inc., appared by their counsel, Steven Wright.

And the Jury returned in accordance with their adjournment yesterday and retired to their chambers to continue their deliberations.

And after some time the Jury returned into Court and upon their oaths do say: "1. We, the Jury, find that the plaintiff, The Estate of Jennings Davis (Ronald Davis, Jennings Lee Davis and Robert Davis) should recover *compensatory damages* from one or more of the defendants and assess *total* damages as follows: A. Funeral, Hospital and Medical Expenses for Jennings Davis — $16,000.00; B. All other Compensatory Damages — $50,000.00. 2. We, the Jury, further find that the following defendants shall be, in whole or in part, responsible for said damages: A. The Celotex Corp. (Philip Carey Co.) YES; B. Fibreboard Corp. YES; C. H.K. Porter (Southern Asbestos, Thermoid) YES; D. Owens-Corning Fiberglas YES. 3. We, the Jury, further find that the plaintiff shall recover *punitive damages*, if any, from the defendants in the following amounts: A. Celotex Corporation (Philip Carey) YES–Amount $40,000; B. Fibreboard Corp. YES–Amount $40,000; C. H.K. Porter Co., Inc. (Southern Asbestos, Thermoid) YES–Amount $40,000.00; D. Owens-Corning Fiberglas Corp. YES–Amount $280,000.00" /s/ Mary Beth Stemple, Foreperson, Date: 2/28/89.

It is therefore ORDERED, ADJUDGED AND DECREED that the Plaintiff, Ronald Davis, Executor of the Estate of Jennings Davis, recover of and from the Defendants, Owens-Corning Fiberglas Corporation, Fibreboard Corporation, The Celotex Corporation, and H. K. Porter Company, Inc., the sum of Seventy Six Thousand Dollars ($76,000.00) with interest at the rate of ten per cent (10%) per annum from February 28, 1989 and the costs of this action.

It is further ORDERED, ADJUDGED AND DECREED that the Plaintiff, Ronald Davis, Executor of the Estate of Jennings Davis, recover of and from the Defendant, The Celotex Corporation, the sum of Forty Thousand Dollars ($40,000.00) with interest at the rate of ten per cent per annum from February 28, 1989.

It is further ORDERED, ADJUDGED AND DECREED that the Plaintiff, Ronald Davis, Executor of the Estate of Jennings Davis, recover of and from the Defendant, Fibreboard Corporation, the sum of Forty Thousand Dollars ($40,000.00) with interest at the rate of ten per cent per annum from February 28, 1989.

It is further ORDERED, ADJUDGED AND DECREED that the Plaintiff, Ronald Davis, Executor of the Estate of Jennings Davis, recover of and from the Defendant, H. K. Porter Company, Inc., the sum of Forty Thousand ($40,000.00) with interest at the rate of ten per cent per annum from February 28, 1989.

It is further ORDERED, ADJUDGED AND DECREED that the Plaintiff, Ronald Davis, Executor of the Estate of Jennings Davis, recover of and from the Defendant, Owens-Corning Fiberglas Corporation, the sum of Two Hundred Eighty Thousand Dollars ($280,000.00) with interest at the rate of ten per cent per annum from February 28, 1989.

ENTERED: February 28, 1989

/s/ [*illegible*]
JUDGE

VERDICT FORM NO. 1

(State of West Virginia — County of Monongalia — Circuit Court)

(RONALD G. DAVIS, Executor of the Estate of Jennings Davis, Plaintiff, vs CELOTEX CORPORATION, et al, Defendants — CIVIL ACTION NO. 86-C-763)

1. We, the Jury, find that the plaintiff, The Estate of Jennings Davis (Ronald Davis, Jennings Lee Davis, and Robert Davis) should recover *compensatory damages* from one or more of the defendants and assess *total* damages as follows:

A. Funeral, Hospital and Medical Expenses for Jennings Davis — *$16,000.00*

B. All other Compensatory Damages — *$50,000.00*

2. We, the Jury, further find that the following defendants shall be, in whole or in part, responsible for said damages:

A. The Celotex Corp. (Philip Carey Co.) ☑ *Yes*

B. Fibreboard Corp. ☑ *Yes*

C. H. K. Porter (Southern Asbestos, Thermoid) ☑ *Yes*

D. Owens-Corning Fiberglas ☑ *Yes*

3. We, the Jury, further find that the plaintiff should recover *punitive damages*, if any, from the defendants in the following amounts:

A. Celotex Corporation (Philip Carey)
☑ *Yes* If Yes, Amount: *$40,000.00*

B. Fibreboard Corp.
☑ *Yes* If Yes, Amount: *$40,000.00*

C. H. K. Porter Co., Inc. (Southern Asbestos, Thermoid)
☑ *Yes* If Yes, Amount: *$40,000.00*

D. Owens-Corning Fibreglas Corp.

☑ *Yes* If Yes, Amount: *$280,000.00*

(Note: *If* Question No. 1 and/or 3 reflects *any* amount *then the jury may, if you choose*, answer Question No. 4 and direct the distribution of that amount. The *total* of Question No. 4 *must* equal the total amount stated in Questions 1 and 3. It is *not* mandatory that you answer Question No. 4, but rather optional.)

4. We, the Jury, further direct that the damages be distributed to the beneficiaries as follows:

To Ronald Davis, Son $ _____
To Jennings Lee Davis, Son $ _____
To Robert Davis, Son $ _____
*Total $ _____

(*Must equal total damages.)

/s/ *Mary Beth Stemple*,
Foreperson

Date: *2/28/89*

VERDICT FORM NO. 2

We, the Jury, find for all of the defendants and against the plaintiff, The Estate of Jennings Davis.

_____
Foreperson

Date: _____

JUDGMENT ORDER

(State of Illinois — Circuit Court —
County of Cook — County Department, Law Division)
(Entered September 28, 1987)

(MAURICE BARRY and JANE BARRY, Plaintiffs, v. THE CELOTEX CORPORATION, et al., Defendants — CONSOLIDATED CAUSE NOS. 83L11989 & 85L11170; IN RE: Asbestos Litigation)

THIS CAUSE having come on for trial and the Jury having heard testimony and received evidence and having delivered its verdict:

IT IS HEREBY ORDERED as follows:

1. That judgment be and is hereby entered in favor of all the defendants against JANE BARRY for both compensatory and punitive damages with costs to the defendants.

2. That judgment be and hereby is entered in favor of the plaintiff MAURICE BARRY against all the defendants in the amount of $125,000.00 as and for compensatory damages with costs to the plaintiff.

3 That judgment be and hereby is entered in favor of the plaintiff MAURICE BARRY against OWENS-CORNING FIBERGLAS in the amount of $25,000.000 as and for punitive damages with costs to the plaintiff.

4. That judgment be and hereby is entered in favor of CELOTEX CORPORATION, PITTSBURGH CORNING CORPORATION, KEENE CORPORATION, EAGLE-PICHER INDUSTRIES and FIBREBOARD CORPORATION against MAURICE BARRY with respect to punitive damages with costs to those defendants.

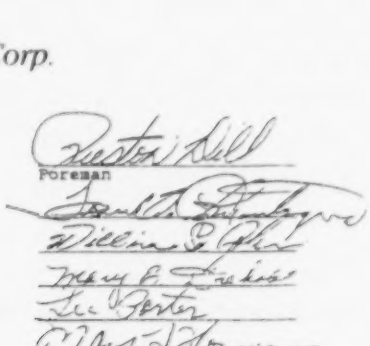
ENTERED: /s/ Judge Dean M. Trafelet
September 29, 1987

We, the Jury, find for the plaintiff or plaintiffs and against the following defendants on the issue of punitive damages, and assess punitive damages in the following amounts:

Owens-Corning Corp	*$25,000*
The Celotex Corp.	*$0*
Eagle-Picher Corp.	*$0*
Fibreboard Corp.	*$0*
Keene Corp	*$0*
Pittsburgh Corning Corp.	*$0*

We further find for the following defendants and against the [handwritten correction: *plaintiff or plaintiffs DMT 9/25/87 5:50 p.m.; Chambers; On Record.*] as to punitive damages:

The Celotex Corp.
Eagle-Picher Corp.
Fibreboard Corp.
Keene Corp
Pittsburgh Corning Corp.



JUDGMENT (FORM APPV'D R-1:22-2) R4:47

(NOT REQUIRED IN CASES IN WHICH AN ORDER FOR JUDGMENT IS TO BE SUBMITTED)

(State of New Jersey — County of Camden — Superior Court, Law Division)
(Filed January 29, 1987)

(Lewis K. Coles and Beverly Coles, his wife, vs. The Celotex Corporation — Docket No. L-071009-83; STYLE OF ACTION: Negligence P.I. Liability & damages; JUDGE: Charles A. Little, J.S.C.)

ATTORNEYS FOR PLAINTIFF(S): *J. Gavin, of Gavin & Gavin*;
ATTORNEY(S) FOR DEFENDANT(S): *on back*

HOW ENTERED: ☑ *JURY VERDICT*
DATES OF TRIAL: *10/29/86, 11/3, 5, 6, 7, 10, 12, 13, 17/86*

MONEY; COSTS (Include Dismissals, No Causes and Judgments against claimants IF WITH COSTS):

AGAINST: *Defendants Raymark Corp., successors to and in lieu of Raubestos Manhattan, In., Owens Illinois Inc, Owens Corning Fiberglass Corp, Eagle Picker Inc,* →→
IN FAVOR OF: *Plaintiff Lewis K. Coles and Beverly Coles, his wife.*
FOR: *Liability and damages in the sum of $100,000.00, plus $31,922.91 interest for a total of $131,922.91, with costs.*

AGAINST: *Plaintiff Lewis K. Coles and Beverly Coles.*
IN FAVOR OF: *Defendant Delaware insulation.*
FOR: *No cause for action, with costs.*

AGAINST: *Defendant Owens Corning Fiberglass* [*sic*].
IN FAVOR OF: *Plaintiff Lewis K. Coles and Beverly Coles.*
FOR: [*Illegible*] *damages in amount of $8,000.00.*
☒ *WITH COSTS*

AGAINST: *Defendant Owens Illinois Inc.*
IN FAVOR OF: *Plaintiff Lewis K. Coles and Beverly Coles.*
FOR: *Punitive damages in amount of $25,000.00, with costs.*
Percentages of liability of respective defendants: on back.

AMENDMENTS TO PLEADINGS AFFECTING JUDGMENT: ____
DISMISSALS, NO CAUSES OR JUDGMENTS AGAINST CLAIMANTS *WITHOUT COSTS*: ____
SPECIAL JUDGMENTS AGAINST PARTICULAR LAND, EG. MECH. LIEN, ATTACHMENT: ____
OTHER: *on other sheet.*

DATED: *11/25/86*
SIGNED: /s/ [*illegible*]
COUNTY CLERK AND DEPUTY CLERK OF SUPERIOR COURT
DATE OF ENTRY: *2687-87*

JUDGMENT ENTRY

(United States District Court —
Southern District of Ohio — Western Division)
(Filed January 15, 1987)

(ROBERT F. GIZZI, Plaintiff, v. CELOTEX CORPORATION, *et al.*, Defendants — C-1-84-961)

Pursuant to the jury verdict, returned and entered on January 5, 1987, judgment is granted in favor of plaintiff, Robert F. Gizzi, against the defendants, Owens-Corning Fiberglas Corp. and Philip Carey/Celotex Corporation, jointly and severally in the amount of $119,910.00, plus legal interest from this date and costs; in favor of the plaintiff, Robert F. Gizzi, against the defendant, Owens-Corning Fiberglas Corp., in the amount of $2,000,000 plus legal interest from this date; and in favor of the defendant Eagle Picher Industries, Inc., against the plaintiff Robert F. Gizzi for its costs.

IT IS SO ORDERED.

/s/ Herman J. Weber, Judge
United States District Court

SPECIAL VERDICT

(United States District Court —
Southern District of Ohio — Western Division)
(Filed January 5, 1987)

(ROBERT F. GIZZI, Plaintiff, v. EAGLE-PICHER INDUSTRIES, *et al.*, Defendants — C-1-84-961)

We, the jury, unanimously find the following Special Verdict:

1. Does plaintiff have or has he had an asbestos-related disease or injury? ☑ *YES*

If your response to Question 1 is "No," answer no further questions. If your response to Question 1 is "Yes," proceed to Question 2.

2. Did plaintiff inhale asbestos fibers from asbestos-containing products manufactured and/or sold by any of the following defendants?

Philip Carey/Celotex Corporation ☑ *YES*
Eagle Picher Industries, Inc. ☑ *YES*
Owens-Corning Fiberglas Corp. ☑ *YES*

Answer the remaining questions only as to that defendant or defendants, if any, to which you answered "Yes" in Question 2.

3. Was one or more of the defendants negligent?

Philip Carey/Celotex Corporation ☑ *YES*
Eagle Picher Industries, Inc. ☑ *NO*
Owens-Corning Fiberglas Corp. ☑ *YES*

4. Was the negligence of one or more of the defendants a proximate cause of injury to plaintiff?

Philip Carey/Celotex Corporation ☑ *YES*
Eagle Picher Industries, Inc. ☑ *NO*
Owens-Corning Fiberglas Corp. ☑ *YES*

5. Did one or more of the defendants breach a product liability duty owed to plaintiff?

Philip Carey/Celotex Corporation	☑ *YES*	
Eagle Picher Industries, Inc.		☑ *NO*
Owens-Corning Fiberglas Corp.	☑ *YES*	

6. Was the breach of a product liability duty of one or more of the defendants a proximate cause of injury to plaintiff?

Philip Carey/Celotex Corporation	☑ *YES*	
Eagle Picher Industries, Inc.		☑ *NO*
Owens-Corning Fiberglas Corp.	☑ *YES*	

7. What amount of damages, if any, do you find plaintiff has or will sustain as a proximate result of his exposure to asbestos fiber manufactured and/or sold by defendants regardless of which party or parties caused it? The listing of the sub-categories below is not intended to imply that you should or must find damages in any or all of these sub-categories.

Damages Sustained to Date:	
Physical/Mental/Emotional Suffering and/or Pain	$ *100,000*
Lost Earnings	$ *10,000*
Necessary Medical and Hospital Expenses	$ *6,500*
Future Damages:	
Physical/Mental/Emotional Suffering and/or Pain	$ *50,000*
Diminution of Earnings Capacity	$ *0*
Necessary Medical and Hospital Expenses	$ *4,800*
Increased Risk of Lung Cancer	$ *0*
TOTAL DAMAGES:	$ *171,300*

8. Was the plaintiff negligent in any respect? ☑ *YES*

9. Was the plaintiff's negligence a proximate cause of the damages, if any, you found he sustained? ☑ *YES*

10. Enter below your finding as to the percentage of responsibility of the parties which directly and proximately contributed to plaintiff's injury and damages:

Plaintiff	*30%*
Defendant(s)	*70%*
TOTAL MUST EQUAL	100%

11. Do you find from a preponderance of the evidence that plaintiff is entitled to punitive damages against Owens-Corning FiberglasCorp? ☑ *YES*

12. If your response to Question 11 was "Yes," what amount of punitive damages shall be awarded to plaintiff?

Owens-Corning Fiberglas Corp. *$2,000,000.00*

Kathleen A. Marx
Foreperson
Dorothy Durel
Linda F. Warren
Myrtle Bailey Robinson

Date: *January 5, 1987*

JUDGMENT

(Commonwealth of Massachusetts —
Superior Court — Middlesex, SS)
(Entered December 28, 1989)

(ANNA C. MARCELLI, Individually and as Executrix of the Estate of GERAMONDO MARCELLI, Plaintiff, vs. CELOTEX CORPORATION and OWENS-CORNING FIBERGLAS, Defendants — Civil Action No. 84-1512)

This action came on for trial before the court and jury, James P. Lynch, Jr., J. Presiding, and the jury having duly rendered their verdict by their answers to special questions propounded to them, it is *ORDERED* and *ADJUDGED:*

1. That the plaintiff Anna C. Marcelli, individually and as executrix of the estate of Geramondo Marcelli, recover of the defendants Celotex Corporation and Owens-Corning Fiberglas the sum of $265,357.92, and her taxable costs in the sum of $_____.

2. That the said sum of $265,357.92 includes applicable interest as provided by law, and represents that amount now owing to the plaintiff after applying a credit in the amount of $222,500.00 for the aggregate of certain settlement payments made or promised to her by third parties. The judgment amount ($265,357.92) is computed as follows: (A) $487,857.92, being the amount of the jury verdict ($289,126.00) with interest thereon from March 15, 1984 (date of entry) to December 1, 1989 (date of payment or promise of payment of the settlement amounts by the third parties) in the sum of $198,149.61, and with further interest thereon from December 1, 1989 to December 28, 1989 (date of this judgment) in the sum of $502.31; less (B) the settlement credit of $222,500.00.

By the court (Lynch, J.)
/s/ Paul F. Mahoney,
Assistant Clerk

Entered: At Cambridge,
December 28, 1989

(*Jurat Omitted*)

JUDGMENT N.O.V.

(Commonwealth of Massachusetts —
Superior Court — Middlesex, SS)
(Entered February 9, 1990)

(ANNA C. MARCELLI, Individually and as Executrix of the Estate of GIRAMONDO MARCELLI, Plaintiff, vs. CELOTEX CORPORATION and OWENS-CORNING FIBERGLAS, Defendants — Civil Action No. 84-1512)

This action came on for trial before the court and jury, James P. Lynch, Jr., J. Presiding, and the jury having duly rendered their verdict by their answers to special questions propounded to them; and the court

having in certain respects granted motions for judgment N.O.V., it is *ORDERED* and *ADJUDGED:*

1. That the plaintiff Anna C. Marcelli, individually and as executrix of the estate of Giramondo Marcelli, recover of the defendants Celotex Corporation and Owens-Corning Fiberglas the sum of $191,890.24 and her taxable costs in the sum of $ _____.

2. That the said sum of $191,890.24 includes applicable interest as provided by law, and represents that amount now owing to the plaintiff after applying a credit in the amount of $222,500.00 for the aggregate of certain settlement payments made or promised to her by third parties. The judgment amount ($191,890.24) is computed as follows: (A) $414,390.16, being the amount of the jury verdict ($264,126.00) with interest thereon from March 15, 1984 (date of entry) to December 1, 1989 (date of payment or promise of payment of the settlement amounts by the third parties) in the sum of $149,320.91 and with further interest thereon from December 1, 1989 to February 9, 1990 (date of this judgment) in the sum of $943.25; less (B) the settlement credit of $222,500.00.

By the court (Lynch, J.)
/s/ Paul F. Mahoney,
Assistant Clerk

Entered: At Cambridge,
February 9, 1990.

(*Jurat Omitted*)

FINAL JUDGMENT ORDER

(State of West Virginia —
Circuit Court — County of Ohio)
(Entered March 31, 1990)

(WILLIAM L. SCHOENIAN, ROBERT HARLER, MARY HARLER, GERNELLE TUSIC, and NANCY TUSIC, Plaintiffs, vs. OWENS-CORNING FIBERGLAS CORPORATION, Defendant — Civil Action No. 87-C-775-Br)

On the 7th day of November, 1989, came the Plaintiffs, William L. Schoenian, Robert Harler, Mary Harler, Gernelle Tusic, and Nancy Tusic, in person and by their attorneys, James H. Rion, Jr., R. Dean Hartley and James M. O'Brien; and as well came the Defendant Owens-Corning Fiberglas Corporation, by its attorney Robert Losey.

THEREUPON, a jury of six (6) persons and four (4) alternates were impaneled and heard evidence presented by the Plaintiffs and the Defendant on November 7, 8, 9, 10, 14, 15, 16, 17, 20, and 21, 1989.

Upon completion of the trial, the jury deliberated and returned the following Verdict on November 21, 1989.

VERDICT FORM A

1. We, the Jury, find in favor of the plaintiff below and against the defendant and assess total compensatory damages as follows:

A. WILLIAM L. SCHOENIAN

☑ *YES* If yes, Amount: *$200,000.00*

B. ROBERT HARLER

☑ *YES* If yes, Amount: *$470,000.00*

MARY HARLER

☑ *YES* If yes, Amount: *$117,500.00*

C. GERNELLE TUSIC

☑ *YES* If yes, Amount: $ *630,000.00*

NANCY J. TUSIC

☑ *YES* If yes, Amount: $ *157,500.00*

We, the Jury, find that plaintiffs should recover punitive damages from the defendant as follows:

A. WILLIAM L. SCHOENIAN

☑ *YES* If yes, Amount: $ *600,000.00*

B. ROBERT HARLER

☑ *YES* If yes, Amount: $ *1,410,000.00*

C. GERNELLE TUSIC

☑ *YES* If yes, Amount: $*1,890,000.00*

/s/ Candace S. McCarthy
FOREPERSON

The Court having previously ruled on all of the post-trial motions and issues presented by counsel in the various memoranda and correspondence which they have submitted to the Court, hereby

ORDERS that Defendant Owens-Corning Fiberglas Corporation, is entitled to a satisfaction *pro tanto* as a result of the previous settlements by Plaintiff William L. Schoenian, with Armstrong World Industries, Keene Corporation, National Gypsum Company, Flexitallic Gasket Company, Inc., AC &S, Inc., Allied Chemical Company, LCP Chemicals of West Virginia, Inc., Anchor Packing, A.W. Chesterton Company, Geo. V. Hamilton, Inc., Babcock & Wilcox Company, Hercules, Inc., Pittsburgh Corning Corporation, Owens-Illinois, The Celotex Corporation, Carey Canada, Inc., and Eagle-Picher Industries, Inc. in the aggregate amount of $40,250.00. It is further

ORDERED that Plaintiff William L. Schoenian is entitled to recover prejudgment interest at the rate of 10 percent *per annum* on his compensatory damages less the

aforesaid setoff amount from August 19, 1987, when his cause of action accrued, until November 21, 1989, the date of the verdict, pursuant to W. Va. Code § 56-6-31, in the amount of $36,103.50, so that Plaintiff William L. Schoenian is, therefore, entitled to Judgment against Defendant Owens-Corning Fiberglas Corporation in the total amount of $795,853.50, along with post-judgment interest on said amount at the rate of 10 percent *per annum* since November 21, 1989. It is further

ORDERED that Defendant Owens-Corning Fiberglas Corporation, is entitled to a satisfaction *pro tanto* as a result of the previous settlements by Plaintiff Robert Harler, with Armstrong World Industries, Keene Corporation, National Gypsum Company, Flexitallic Gasket Company, Inc., AC &S, Inc., CSX Transportation, Inc., successor-in-interest to the Baltimore & Ohio Railroad Company, Allied Chemical Company, LCP Chemicals fo West Virginia, Inc., Anchor Packing, A.W. Chesterton Company, Geo. V. Hamilton, Inc., Babcock & Wilcox Company, Hercules, Inc., Pittsburgh Corning Corporation, Owens-Illinois, The Celotex Corporation, Carey Canada, Inc., and Eagle-Picher Industries, Inc. in the aggregate amount of $96,250.00. It is further

ORDERED that Plaintiff Robert Harler is entitled to recover prejudgment interest at the rate of 10 percent *per annum* on his compensatory damages less the aforesaid setoff amount from November 17, 1986, when his cause of action accrued, until November 21, 1989, the date of the verdict, pursuant to W. Va. Code § 56-6-31 in the amount of $112,498.75, so that Plaintiff Robert Harler is, therefore, entitled to Judgment against Defendant Owens-Corning Fiberglas Corporation in the total amount of $1,896,248.75, along with post-judgment interest on said amount at the rate of 10 percent *per annum* since November 21, 1989. It is further

ORDERED that a Judgment be entered in favor of Plaintiff Mary Harler, and against Defendant Owens-Corning Fiberglas Corporation, in the amount of $117,500.00, along with post-judgment interest on said amount at the rate of 10 percent *per annum* since November 21, 1989. It is further

ORDERED that Defendant Owens-Corning Fiberglas Corporation, is entitled to a satisfaction *pro tanto* as a result of the previous settlements by Plaintiff Gernelle Tusic, with Armstrong World Industries, Keene Corporation, National Gypsum Company, Flexitallic Gasket Company, Inc., AC&S, Inc., Allied Chemical Company, LCP Chemicals of West Virginia, Inc., Anchor Packing, A.W. Chesterton Company, Geo. V. Hamilton, Inc., Babcock & Wilcox Company, Hercules, Inc., Pittsburgh Corning Corporation, Owens-Illinois, The Celotex Corporation, Carey Canada, Inc., Eagle-Picher Industries, Inc., and Fibreboard Corporation in the aggregate amount of $126,750.00. It is further

ORDERED that Plaintiff Gernelle Tusic is entitled to recover prejudgment interest at the rate of 10 percent *per annum* on his compensatory damages less the aforesaid setoff amount from October 7, 1987, when his cause of action accrued, until November 21, 1989, the date of the verdict, pursuant to W. Va. Code § 56-6-31 in the amount of $106,689.00, so that Plaintiff Gernelle Tusic is, therefore, entitled to Judgment against Defendant Owens-Corning Fiberglas Corporation in the total amount of $2,499,939.00, along with post-judgment interest on said amount at the rate of 10 percent *per annum* since November 21, 1989. It is further

ORDERED that a Judgment be entered in favor of Plaintiff Nancy Tusic, and against Defendant Owens-Corning Fiberglas Corporation, in the amount of $157,500.00, along with post-judgment interest on said amount at the

rate of 10 percent *per annum* since November 21, 1989. It is further

ORDERED that all Court costs in the Trial of this civil action, as specified in this Court's Opinion and Order of March 8, 1990, are hereby assessed against Defendant Owens-Corning Fiberglas Corporation.

The Court hereby grants Plaintiffs' Motion to Amend their Complaint so that the *ad damnum* clause will conform to the Jury's verdict, and the Complaint shall hereby de deem[*ed*] amended without the necessity of Plaintiffs filing any additional pleading.

The Court notes that Defendant Owens-Corning Fiberglas Corporation, objects and excepts to all of the foregoing provisions of this Judgment Order which are adverse to its interests, and further notes that Plaintiffs William L. Schoenian, Robert Harler, and Gernelle Tusic each objects and excepts to the Court's denial of prejudgment interest on punitive damages, and its permitting the Defendant a setoff for the amounts of the prior settlements.

The Clerk is directed to send a certified copy of this Final Judgment Order to counsel of record.

Entered this 31st day of March, 1990.

/s/ W. Craig Broadwater,
Judge

(*Jurat Omitted*)

OWENS-CORNING FIBERGLAS CORPORATION
1993 THIRD QUARTER REPORT FORM 10-Q

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THIS CONFORMING PAPER FORMAT DOCUMENT IS BEING SUBMITTED PURSUANT TO RULE 901(d) OF REGULATION S-T.

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-Q

QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934

For the Quarterly Period Ended September 30, 1993
Commission File No. 1-3660

Owens-Corning Fiberglas Corporation
Fiberglas Tower, Toledo, Ohio 43659
Telephone No. (419) 248-8000
A Delaware Corporation
I.R.S. Employer Identification No. 34-4323452

Indicate by check mark whether the Registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the Registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. ☑ *Yes*

Shares of common stock, par value $.10 per share, outstanding at October 31, 1993
42,860,739

PART I. FINANCIAL INFORMATION

ITEM 1. FINANCIAL STATEMENTS

OWENS-CORNING FIBERGLAS CORPORATION AND SUBSIDIARIES
CONSOLIDATED STATEMENT OF INCOME

	Quarter Ended September 30,		*Nine Months Ended September 30,*	
	1993	*1992*	*1993*	*1992*
	(In millions of dollars, except share data)			
NET SALES	$785	$786	$2,190	$2,144
COST OF SALES	613	613	1,715	1,685
Gross margin	172	173	475	459
OPERATING EXPENSES				
Marketing and administrative expenses	73	79	220	225
Science and technology expenses	18	17	51	47
Other	3	6	10	15
Restructuring costs (Note 8)	–	–	23	–
Write-down of hydrocarbon ventures	8	–	8	–
Total operating expenses	102	102	312	287
INCOME FROM OPERATIONS	70	71	163	172
Cost of borrowed funds	(23)	(27)	(68)	(86)
INCOME BEFORE PROVISION FOR INCOME TAXES	47	44	95	86
Provision for income taxes (Note 4)	3	11	29	27
INCOME BEFORE EQUITY IN NET INCOME (LOSS) OF AFFILIATES	44	33	66	59
Equity in net income (loss) of affiliates	4	(1)	6	1
INCOME BEFORE EXTRAORDINARY ITEMS AND CUMULATIVE EFFECT OF ACCOUNTING CHANGE	48	32	72	60
Extraordinary items (Notes 4 and 9)	–	–	–	(1)
Cumulative effect of accounting change for income taxes (Note 4)	–	–	26	–
NET INCOME	$48	$32	$98	$59

The accompanying notes are an integral part of this statement.

OWENS-CORNING FIBERGLAS CORPORATION AND SUBSIDIARIES
CONSOLIDATED STATEMENT OF INCOME (Continued)

	Quarter Ended September 30,		*Nine Months Ended September 30,*	
	1993	*1992*	*1993*	*1992*
	(In millions of dollars, except share data)			
NET INCOME PER COMMON SHARE				
Primary:				
Income before extraordinary items and cumulative effect of accounting change	$ 1.09	$.75	$1.65	$1.38
Extraordinary items (Notes 4 and 9)	–	–	–	(.02)
Cumulative effect of accounting change for income taxes (Note 4)	–	–	.60	–
Net income per share	$1.09	$.75	$2.25	$1.36
Assuming full dilution:				
Income before extraordinary items and cumulative effect of accounting change	$1.01	$.71	$1.58	$1.37
Extraordinary items (Notes 4 and 9)	–	–	–	(.02)
Cumulative effect of accounting change for income taxes (Note 4)	–	–	.53	–
Net income per share	$1.01	$.71	$2.11	$1.35
Weighted average number of common shares outstanding and common equivalent shares during the period (in millions)				
Primary	43.7	43.1	43.5	43.0
Assuming full dilution	49.5	48.9	49.3	48.8

The accompanying notes are an integral part of this statement.

OWENS-CORNING FIBERGLAS CORPORATION AND SUBSIDIARIES
CONSOLIDATED BALANCE SHEET

	September 30, 1993	*December 31, 1992*
	(In millions of dollars)	
ASSETS		
CURRENT		
Cash and cash equivalents	$ 7	$ 2
Receivables	422	310
Inventories (Note 5)	231	233
Deferred income taxes	135	98
Other current assets	16	15
Total current	811	658
OTHER		
Goodwill	77	84
Investments in affiliates	55	49
Deferred income taxes	446	421
Other noncurrent assets	80	68
Total other	658	622
PLANT AND EQUIPMENT, at cost		
Land	44	46
Buildings and leasehold improvements	557	549
Machinery and equipment	1,947	1,886
Construction in progress	82	79
	2,630	2,560
Less —Accumulated depreciation (Note 3)	(1,752)	(1,714)
Net plant and equipment	878	846
TOTAL ASSETS	$ 2,347	$ 2,126

The accompanying notes are an integral part of this statement.

OWENS-CORNING FIBERGLAS CORPORATION AND SUBSIDIARIES
CONSOLIDATED BALANCE SHEET (Continued)

	September 30, 1993	*December 31, 1992*
	(In millions of dollars)	
LIABILITIES AND STOCKHOLDERS' EQUITY		
CURRENT		
Accounts payable and accrued liabilities	$ 475	$ 390
Reserve for asbestos litigation claims — current portion (Note 7)	150	50
Short-term debt	73	56
Long-term debt — current portion	37	25
Accrued income taxes	2	14
Total current	737	535
LONG-TERM DEBT	998	1,018
OTHER		
Reserve for asbestos litigation claims (Note 7)	790	900
Other postretirement benefits liability	352	358
Reserve for rebuilding furnaces	12.6	124
Pension plan liability	68	62
Other	178	137
Total other	1,514	1,581
COMMITMENTS AND CONTINGENCIES (Note 7)		
STOCKHOLDERS' EQUITY		
Preferred stock, no par value; authorized 8,000,000 shares, none outstanding		
Common stock, par value $.10 per share; authorized 100,000,000 shares; issued 42.8 million shares at September 30, 1993, 42.5 million shares at December 31, 1992	309	299
Deficit	(1,204)	(1,302)
Foreign currency translation adjustments	1	4
Other	(8)	(9)
Total stockholders' equity	(902)	(1,008)
TOTAL LIABILITIES AND STOCKHOLDERS' EQUITY	$ 2,347	$ 2,126

The accompanying notes are an integral part of this statement.

OWENS-CORNING FIBERGLAS CORPORATION AND SUBSIDIARIES
CONSOLIDATED STATEMENT OF CASH FLOWS

	Quarter Ended September 30,		*Nine Months Ended September 30,*	
	1993	*1992*	*1993*	*1992*
	(In millions of dollars)			
NET CASH FLOW FROM OPERATIONS				
Net income	$ 48	$ 32	$ 98	$ 59
Reconciliation of net cash provided by operating activities:				
Noncash items:				
Cumulative effect of accounting change	–	–	(26)	–
Provision for depreciation and amortization and for rebuilding furnaces (Note 3)	29	38	86	112
Provision (credit) for deferred income taxes	(9)	(7)	(7)	(19)
Other	8	2	13	8
Uninsured asbestos claims and insurance deductibles	–	(1)	(10)	(6)
(Increase) decrease in receivables	(34)	3	(117)	(142)
(Increase) decrease in inventories	2	13	(4)	–
Increase (decrease) in accounts payable and accrued liabilities	41	33	81	16
Increase (decrease) in accrued income taxes	(4)	(7)	(13)	(5)
Other	(17)	5	(7)	10
Net cash flow from operations	64	111	94	33
NET CASH FLOW FROM INVESTING				
Additions to plant and equipment	(47)	(26)	(108)	(71)
Expenditures for rebuilding furnaces	(4)	(4)	(8)	(13)
Other	1	4	2	7
Net cash flow from investing	(50)	(26)	(114)	(77)

The accompanying notes are an integral part of this statement.

OWENS-CORNING FIBERGLAS CORPORATION AND SUBSIDIARIES
CONSOLIDATED STATEMENT OF CASH FLOWS (Continued)

	Quarter Ended September 30,		*Nine Months Ended September 30,*	
	1993	*1992*	*1993*	*1992*
	(In millions of dollars)			
NET CASH FLOW FROM FINANCING				
Net additions (reductions) in long-term credit facilities	$(13)	$(68)	$ 7	$ (32)
Other additions to long-term debt	–	–	–	337
Other reductions to long-term debt	(5)	(3)	(12)	(289)
Net increase (decrease) in short-term debt	6	(15)	20	24
Other	3	–	10	5
Net cash flow from financing	(9)	(86)	25	45
Net increase (decrease) in cash and cash equivalents	5	(1)	5	1
Cash and cash equivalents at beginning of period	2	5	2	3
Cash and cash equivalents at end of period	$ 7	$ 4	$ 7	$ 4

The accompanying notes are an integral part of this statement.

OWENS-CORNING FIBERGLAS CORPORATION AND SUBSIDIARIES
NOTES TO CONSOLIDATED FINANCIAL STATEMENTS

(1) SEGMENTS

	Quarter Ended September 30,		*Nine Months Ended September 30,*	
	1993	*1992*	*1993*	*1992*
	(In millions of dollars)			
BUSINESS SEGMENTS:				
NET SALES				
Construction Products	$533	$545	$1,440	$1,409
Industrial Materials	252	241	750	735
	785	786	2,190	2,144
Intersegment sales				
Construction Products	–	–	–	–
Industrial Materials	24	24	68	67
Eliminations	(24)	(24)	(68)	(67)
	–	–	–	–
Consolidated net sales	$785	$786	$2,190	$2,144
INCOME FROM OPERATIONS				
Construction Products	$54	$55	$118	$82
Industrial Materials	32	27	72	110
General corporate expense	(16)	(11)	(27)	(20)
Income from operations	70	71	163	172
Cost of borrowed funds	(23)	(27)	(68)	(86)
Income before provision for income taxes	$47	$44	$95	$86

(1) SEGMENTS (CONTINUED)

	Quarter Ended September 30,		*Nine Months Ended September 30,*	
	1993	*1992*	*1993*	*1992*
	(In millions of dollars)			
GEOGRAPHIC SEGMENTS:				
NET SALES				
United States	$602	$593	$ 1,661	$ 1,585
Europe and other	125	133	378	397
Canada	58	60	151	162
	785	786	2,190	2,144
Intersegment sales				
United States	12	9	35	29
Europe and other	5	2	8	5
Canada	12	11	38	31
Eliminations	(29)	(22)	(81)	(65)
	–	–	–	–
Consolidated net sales	$785	$786	$ 2,190	$ 2,144
INCOME FROM OPERATIONS				
United States	$69	$71	$186	$150
Europe and other	8	6	(6)	37
Canada	9	5	10	5
General corporate expense	(16)	(11)	(27)	(20)
Income from operations	70	71	163	172
Cost of borrowed funds	(23)	(27)	(68)	(86)
Income before provision for income taxes	$47	$44	$95	$86

(2) GENERAL

The financial statements included in this Report are condensed and unaudited, pursuant to certain Rules and Regulations of the Securities and Exchange Commission, but include, in the opinion of the Company, adjustments necessary for a fair statement of the results for the periods indicated, which, however, are not necessarily indicative of results which may be expected for the full year.

In connection with the condensed financial statements and notes included in this Report, reference is made to the financial statements and notes thereto contained in the Company's 1992 Annual Report on Form 10-K, as filed with the Securities and Exchange Commission.

(3) PLANT AND EQUIPMENT AND DEPRECIATION

In the first six months of 1993, the Company completed a review of its fixed asset lives. The Company determined that as a result of actions taken to increase its preventative maintenance and programs initiated with its equipment suppliers to increase the quality of their products, actual lives for certain asset categories were generally longer than the useful lives for depreciation purposes. Therefore, during the second quarter of 1993, the Company revised the estimated useful lives of certain categories of plant and equipment, effective April 1, 1993. The effect of this change in estimate reduced depreciation expense for the six months ended September 30, 1993 by $9 million and increased income before extraordinary items and cumulative effect of accounting change by $6 million ($.13 per share).

(4) INCOME TAXES

Effective January 1, 1993, the Company adopted Financial Accounting Standards Board Statement No. 109, "Accounting for Income Taxes". Statement No. 109 changes the criteria for measuring the provision for income taxes and recognizing deferred tax assets and liabilities. The cumulative effect of adopting the standard increased earnings by $26 million as of January 1, 1993.

The major components of deferred tax assets and liabilities arising from temporary differences at January 1, 1993 are as follows:

	Deferred Tax Assets	*Deferred Tax Liabilities*
	(In millions of dollars)	
Asbestos litigation claims	$ 382	$ –
Other postretirement benefits	152	–
Depreciation	2	93
Furnace rebuild reserves	50	–
Product liability	28	–
Net operating loss carryforwards	28	–
Other	103	46
Subtotal	745	139
Valuation allowance	(33)	–
Total deferred taxes	$ 712	$ 139

As of January 1, 1993, approximately $ 10 million of deferred taxes have not been provided for investments in foreign subsidiaries that were deemed to be permanently reinvested.

The total net operating loss carryforwards have been fully reserved in the valuation allowance and expire from 1995 through 1999. For the nine months ended September 30, 1993, the valuation allowance was increased by $ 11 million relating to operating losses of certain foreign subsidiaries.

In the third quarter 1993, the deferred tax assets and liabilities were increased by $ 14 million to reflect the increase in the U.S. federal statutory rate from 34% to 35%.

The reconciliation between the U.S. federal statutory rate and the Company's consolidated effective income tax rate is:

	Quarter Ended September 30,		Nine Months Ended September 30,	
	1993	1992	1993	1992
U.S. federal statutory rate	35%	34%	35%	34%
Increase in U.S. federal statutory rate	(30)	–	(15)	–
Operating losses of foreign subsidiaries	3	1	12	6
Difference between foreign tax rates and U.S. statutory rate	(1)	2	–	–
Provision for taxes on undistributed earnings of foreign subsidiaries	–	(13)	(3)	(8)
State and local income taxes	3	–	4	–
Other	(3)	–	(2)	–
Effective tax rate	7%	24%	31%	32%

During the nine months ended September 30, 1992, the Company utilized net operating loss carryforwards which resulted in an extraordinary credit of approximately $2 million, or $.05 per share.

(5) INVENTORIES

Inventories are summarized as follows:

	September 30, 1993	December 31, 1992
	(In millions of dollars)	
Finished goods	$ 201	$203
Materials and supplies	122	119
	323	322
Less: reduction to LIFO basis	(92)	(89)
	$ 231	$ 233

Approximately $90 million and $97 million of net inventories were valued using the LIFO method at September 30, 1993 and December 31, 1992, respectively.

(6) CONSOLIDATED STATEMENT OF CASH FLOWS

Cash payments for income taxes and cost of borrowed funds are summarized as follows:

	Quarter Ended September 30,		Nine Months Ended September 30,	
	1993	1992	1993	1992
	(In millions of dollars)			
Income taxes	$14	$26	$41	$44
Cost of borrowed funds	7	22	51	77

(7) CONTINGENT LIABILITIES

ASBESTOS LIABILITIES

The Company is a co-defendant with other former manufacturers, distributors and installers of products containing asbestos and with miners and suppliers of asbestos fibers (collectively, the Producers) in personal injury and property damage litigation. The personal injury claimants generally allege injuries to their health caused by inhalation of asbestos fibers from the Company's products. Most of the claimants seek punitive damages as well as compensatory damages. The property damage claims generally allege property damage to school, public and commercial buildings resulting from the presence of products containing asbestos. Virtually all of the asbestos-related lawsuits against the Company arise out of its manufacture, distribution, sale or installation of an asbestos-containing calcium silicate, high temperature insulation product, the manufacture of which was discontinued in 1972.

Status

As of September 30, 1993, approximately 94,000 asbestos personal injury claims were pending against the Company, 11,200 of which were received in the third quarter of 1993. The Company received approximately 26,600 such claims in 1992, 20,900 in 1991 and 22,500 in 1990.

Through September 30, 1993, the Company had resolved (by settlement or otherwise) approximately 116,400 asbestos personal injury claims, 15,800 of which were resolved in 1993. During 1990, 1991 and 1992, the

Company resolved approximately 54,800 such claims and incurred total indemnity payments of $539 million (an average of less than $10,000 per case). As of September 30, 1993, the Company had agreed in principle to settle approximately 15,600 additional cases which will be processed and reflected in settlements during 1993 and future years. Although the precise amounts are subject to certain contingencies, the average payment in these additional cases is expected to be somewhat higher than the Company's settlement average for 1990, 1991 and 1992. The Company's indemnity payments have varied considerably over time and from case to case, and are affected by a multitude of factors. These include the type and severity of the disease sustained by the claimant (i.e., mesothelioma, lung cancer, other types of cancer, asbestosis or pleural changes); the occupation of the claimant; the extent of the claimant's exposure to asbestos-containing products manufactured, sold or installed by the Company; the extent of the claimant's exposure to asbestos-containing products manufactured, sold or installed by other Producers; the number and financial resources of other Producer defendants; the jurisdiction of suit; the presence or absence of other possible causes of the claimant's illness; the availability or not of legal defenses such as the statute of limitations or state of the art; and whether the claim was resolved on an individual basis or as part of a group settlement.

The Company anticipates incurring defense costs of approximately $50-60 million in respect of asbestos personal injury claims in 1993.

Insurance

As of September 30, 1993, the Company had approximately $431 million in unexhausted products hazard coverage (net of deductibles and self-insured retentions

and excluding coverage issued by insolvent carriers) under its liability insurance policies applicable to asbestos personal injury claims. Of this amount, $144 million will not be available until the years 1996 through 2000 under an agreement with the carrier confirming such insurance. An additional $71 million (out of the $431 million total coverage) is presently the subject of coverage litigation or alternate dispute resolution procedures. All of the Company's liability insurance policies cover indemnity payments and defense fees and expenses subject to applicable policy limits.

In addition, the Company has substantial unexhausted non-products coverage under such liability insurance policies; an as yet undetermined amount of such non-products coverage is expected to be available for payment of asbestos personal injury claims and associated defense fees and expenses. The Company has commenced arbitration with its primary level insurance carrier seeking to confirm the availability of certain of its non-products coverage for payment of certain asbestos personal injury liabilities, involving the activities of the Company's former insulation contracting business. The Company is seeking prompt rulings on the issues presented, and the arbitration agreement contemplates a schedule that would result in resolution (subject to appeal) no later than mid-1994. For purposes of calculating the reserve described below, the Company has estimated its recoveries in respect of non-products coverage for claims received through 1999 at approximately $300 million, which represents the Company's best estimate of such recoveries for such claims. The Company cautions, however, that this coverage is unconfirmed and that the actual amounts recovered by the Company could, depending upon the outcome of the arbitration, be much higher or much lower.

Reserve

As a result of its pre-1992 charges for asbestos litigation, the Company had a reserve of $940 million, $950 million and $955 million (including $150 million, $50 million and $5 million in current liabilities) as of September 30, 1993 and December 31, 1992 and 1991, respectively. This reserve is intended to provide for the uninsured indemnity and defense costs associated with pending and unasserted asbestos personal injury claims that may be received by the Company through the year 1999.

The Company notes, however, that recent case filing rates have been at historically high levels (approximately 26,600 new claims in 1992 and approximately 24,000 claims during the first three quarters of this year). Many of these new claims appear to be the product of mass screening programs and not to involve significant asbestos-related impairment. The large number of recent filings and the uncertain value of these claims have added to the uncertainties involved in calculating the Company's reserve. The Company notes that the courts have treated unimpaired claims in very different ways. For example, the Circuit Court for Kanawha County, West Virginia has scheduled a consolidated trial in early 1994 of so-called common issues (including punitive damage issues) of several thousand asbestos personal injury claims (most of which appear to be unimpaired). On the other hand, the Pennsylvania Superior Court has recently held that asymptomatic asbestos-related pleural changes do not state a cause of action under Pennsylvania law, unless this ruling is overturned by the state Supreme Court, it is likely to result in large numbers of case dismissals in Pennsylvania (which has the largest backlog of asbestos claims of any state). Moreover, certain of the Company's principal co-defendants, the 20 members of the Center for Claims Resolution, have entered into a proposed

"global" settlement which would require future claimants to satisfy certain medical criteria indicative of significant asbestos-related impairment as a pre-condition to their eligibility for settlement payments. The Company is using similar criteria in the implementation of its own settlement and litigation strategy and is also seeking to require more careful proof than in the past that claimants had significant exposure to the Company's asbestos-containing product or operations. Depending upon the outcome of the various uncertainties described above, particularly as they relate to unimpaired claims, it may be necessary at some point in the future for the Company to make additional provision for the uninsured costs of asbestos personal injury claims received through the year 1999 (although no such amounts are reasonably estimable at this time). The Company remains confident that its reserve will be sufficient to provide for the uninsured costs of all such claims that involve malignancies or significant asbestos-related functional impairment. The Company will continue to review the adequacy of its reserve on a periodic basis and make such adjustments to the reserve as may be appropriate.

The Company cautions that such factors as the number of future asbestos personal injury claims received by it, the rate of receipt of such claims and the indemnity and defense costs associated with asbestos personal injury claims, as well as the prospects for confirming additional, applicable insurance coverage beyond the $431 million referenced above, are influenced by numerous variables that are difficult to predict, and that estimates, such as the Company's, which attempt to take account of such variables, are subject to considerable uncertainty. Accordingly, the actual uninsured costs associated with asbestos personal injury claims received by the Company through 1999

may be higher or lower than those provided for by the Company's reserve.

The Company cannot estimate and is not providing for the cost of unasserted claims which may be received by the Company after the year 1999 because management is unable to predict the number of claims to be received after 1999, the severity of disease which may be involved and other factors which would affect the cost of such claims.

Cash Expenditures

The Company's anticipated cash expenditures for uninsured asbestos-related costs of claims received through 1999 are expected to approximate the Company's existing reserve of $940 million. They will vary annually depending upon a number of factors, including the pace of the Company's resolution of claims and the timing of payment of its insurance.

Management Opinion

Although any opinion is necessarily judgmental and must be based on information now known to the Company, in the opinion of management, the additional uninsured and unreserved costs which may arise out of pending personal injury and property damage asbestos claims and additional similar asbestos claims filed in the future will not have a materially adverse effect on the Company's financial position. While such additional uninsured and unreserved costs incurred in and after the year 2000 may be substantial over time, management believes that any such additional costs will not impair the ability of the Company to meet its obligations, to reinvest in its businesses or to take advantage of attractive opportunities for growth.

NON-ASBESTOS LIABILITIES

In October 1991, the Company and certain of its officers and directors were named as defendants in a lawsuit captioned *Gaetana Lavalie* v. *Owens-Corning Fiberglas Corporation, et al.* in the United States District Court for the Northern District of Ohio. *Lavalie* purports to be a securities class action on behalf of all purchasers of the Company's common stock during the period November 1, 1988 through October 18, 1991. The complaint alleges that the Company's disclosures during the alleged class period contained material misstatements and omissions concerning its contingent liabilities for asbestos claims. The complaint seeks an unspecified amount of damages (including punitive damages) on the theory that such alleged misstatements and omissions artificially inflated the price of the Company's stock. Various other lawsuits and claims arising in the normal course of business are pending against the Company, some of which allege substantial damages. Management believes that the outcome of these lawsuits and claims will not have a materially adverse effect on the Company's financial position or results of operations.

(8) RESTRUCTURING OF OPERATIONS

In the first quarter of 1993, the Company recorded a $23 million charge to reorganize its European operations. This charge included $17 million for personnel reductions and $6 million for the writedown of fixed assets.

(9) RETIREMENT OF DEBT

During the second quarter 1992 the Company called, prior to maturity, its senior subordinated debentures having a face value of $240 million which resulted in a noncash extraordinary loss due to the remaining

issuance costs of approximately $2 million, or $.05 per share, net of related taxes.

During the third quarter of 1992 the Company called, prior to maturity, its 12% sinking fund debentures having a face value of $36 million which resulted in an extraordinary loss of approximately $1 million, or $.02 per share, net of related income taxes.

ITEM 2. MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

RESULTS OF OPERATIONS

Net income for the third quarter of 1993 before special items was $38 million, or $.87 per share, an increase of 19 percent compared to $32 million, or $.75 per share, in the third quarter of 1992. Net income totalled $48 million, or $1.09 per share, after special items. The special items included a one-time gain of $14 million, or $.33 per share, reflecting a tax benefit resulting from a reevaluation of deferred taxes necessitated by the new federal tax law, offset, in part, by an increase in the Company's corporate tax rate and a one-time charge of $5 million, or $.11 per share, for the write-down of hydrocarbon ventures to net realizable value. The Company established these ventures in the 1970's to ensure a steady supply of natural gas. Given the stable price and supply of natural gas, the Company plans to sell these ventures.

Net sales were $785 million, compared to $786 million a year ago.

For the first nine months of 1993, net income was $98 million, or $2.25 per share. In addition to the special items in the third quarter, these results included an after-tax credit of $26 million, or $.60 per share, for the cumulative effect of adopting the new accounting stan-

dard for income taxes (SFAS No. 109). Also included for the first nine months was a one-time charge of $23 million, or $.53 per share, for actions taken to improve the competitive position of the Company's European business. Excluding these special items, net income was $85 million, or $1.96 per share, compared to net income before extraordinary items of $60 million, or $1.38 per share, for the first nine months of 1992.

Net sales were $2.190 billion in the first nine months of 1993, compared to $2.144 billion in the year earlier period.

The results for the quarter and the year to date period reflected modestly improving economic conditions in the United States, while the Company is experiencing continued weakness in other global markets, particularly Europe.

The Construction Products Group benefitted from a modest increase in housing starts and a slightly improved pricing trend. However, consumer concerns about the economy and the adverse impact from the floods in the Midwest led to a 2 percent decline in third quarter sales. In addition, residential roofing sales were not as strong as the prior year third quarter when sales were aided by storms in Texas, Louisiana, and Florida.

North American sales volumes in the Industrial Materials Group continued to be strong. In particular, demand for reinforcements continued to exceed capacity in the Company's North American facilities. As a result, the Company imported product from its worldwide operations at an added cost. Imports are expected to continue until the Company's plant in Jackson, Tennessee, is reactivated in 1994, presently scheduled for April. The Company is in the process of implementing a series of steps expected to reduce costs and increase productivity in its European operations beginning in

1994. These operations are impacted by the weak European economy, extreme pricing pressures, and a high cost structure.

The Company also recently completed the divestiture of its rockwool insulation plant in Guararema, Brazil, and closed its calcium silicate insulation facility in Berlin, New Jersey. Those businesses did not use the Company's core technologies and did not fit its long-term strategy for profitable global growth.

During the third quarter the Company announced the intention of transferring its commercial roofing business (except Trumbull Asphalt) to Schuller International in exchange for their residential roofing business. This exchange would triple the capacity to produce laminated shingles. Transactions such as this are subject to the completion of due diligence and approval of the Federal Trade Commission (FTC). At the end of their initial review period, the FTC asked for additional information, extending the deadline for considering the Company's request.

During the third quarter the Company launched a nationwide roll-out of PINKPLUS™, a new Pink Fiberglas® insulation wrapped in pink polyethylene for easy handling and installation. This product is expected to help build the Company's share of the do-it-yourself home insulation market. The Company also completed the acquisition of the assets of Vera A/S, a manufacturer of large-diameter glass-reinforced plastic pipe in Sandefjord, Norway. In addition, the thermal performance of AURA™, a high R-value vacuum panel insulation concept, has been significantly increased over previously attained levels. AURA™ should enable manufacturers to produce refrigerators, ovens and other appliances that have substantially thinner walls and consume less energy.

Despite economic and pricing pressure in Europe, gross margin for the third quarter of 1993 was 22%, the same as the prior year period, which is the result of ongoing productivity improvements and cost reductions.

The Company's cost of borrowed funds for the third quarter of 1993 was $4 million lower than during the corresponding quarter of the prior year due to lower interest rates and the lower debt level during the quarter compared to a year ago.

Effective January 1, 1993, the Company adopted Statement of Financial Accounting Standards No. 109, "Accounting for Income Taxes" (SFAS No. 109). The standard changes the criteria for measuring the provision for income taxes and recognizing deferred tax assets and liabilities. As noted above, the cumulative effect of adopting SFAS No. 109 increased earnings by $26 million (or $.60 per share). In the second quarter, the Company changed its depreciable asset lives, based on actual experience, which results in lower ongoing depreciation expense.

LIQUIDITY, CAPITAL RESOURCES AND OTHER RELATED MATTERS

Net inventories were relatively unchanged at the end of the third quarter compared with year-end 1992 and the end of the third quarter 1992. Total receivables at September 30, 1993 were $422 million, $112 million higher than at year-end 1992 because of seasonally higher sales at the end of the third quarter.

At September 30, 1993, the Company's working capital was $74 million and its current ratio was 1.1, compared to $123 million and 1.2, respectively, at December 31, 1992.

Cash flow from operations was $64 million for the third quarter 1993, compared to $111 million for the

same quarter of last year. The reason for the reduction is primarily due to a greater accounts receivable change between the second and third quarters of 1993, as compared to the related prior year quarters. Cash flow from operations for the first nine months of 1993 was $94 million, compared to $33 million in 1992. Increases were primarily due to improved net income and greater control of working capital, principally accounts receivable and accounts payable.

Total borrowings at September 30, 1993 were $9 million higher than at year-end 1992, but $96 million lower than at the end of the third quarter 1992. At the end of the third quarter, the Company had unused lines of credit of $280 million under long-term bank loan facilities and an additional $112 million under short-term facilities. The Company has established a $375 million credit facility with a syndicate of banks, led by Credit Suisse, serving as the agent, replacing the previous facility due to expire in July 1994. The facility agreement is for a four year term, effective November 2, 1993, and will lower the Company's cost of financing as well as generating greater flexibility for investment purposes.

Capital spending for property, plant and equipment was $47 million during the third quarter. At the end of the quarter, approved capital projects, excluding furnace rebuilds, were $121 million. The Company expects total capital spending of approximately $140 million in 1993, excluding furnace rebuilds, compared to $130 million in 1992. The Company expects that funding for these expenditures will be from the Company's operations and external sources as required.

In the third quarter of 1993, the Company received approximately 11,200 new asbestos personal injury cases (a substantial increase compared to prior periods) and resolved approximately 2,800 cases. The

majority of the new claims are contained in a few complaints providing sparse factual detail and involving alleged occupational exposures (such as merchant seamen) which, in the Company's experience, have a low settlement value.

The resolution of asbestos personal injury cases is expected to result in substantial cash expenditures beginning in the 1993-94 period. The amount of such expenditures will vary annually, depending on a number of factors, including the pace of the Company's resolution of cases and the timing of payments of its insurance. The Company has established an asbestos reserve ($940 million at September 30, 1993 of which the current portion was $150 million) to cover the estimated uninsured asbestos liability costs for pending and unasserted cases received through the end of the decade. Because of recent developments in the asbestos litigation (such as the high level of recent filings and the uncertain value of the cases filed, many of which are the product of mass screening programs and appear to involve little, if any, asbestosrelated impairment), it has become more difficult to estimate such uninsured costs, especially for claims not involving demonstrable asbestos-related impairment. See the discussion of Asbestos Liabilities on pages 12 through 15. However, the Company believes that the existing reserve should be sufficient to provide for all the uninsured costs of asbestos personal injury claims involving malignancies or significant asbestos-related impairment that are likely to be received by the Company through the end of the decade.

The Company expects funds generated from operations, together with funds available under long and short term bank loan facilities, to be sufficient to satisfy its debt service obligations under its existing indebted-

ness, as well as its contingent liabilities for uninsured asbestos personal injury claims.

The Company has been deemed by the Environmental Protection Agency (EPA) to be a potentially responsible party (PRP) with respect to certain sites under the Comprehensive Environmental Response, Compensation and Liability Act (Superfund). The Company has also been deemed a PRP under similar state or local laws. In other instances, other PRPs have brought suits or claims against the Company as a PRP for contribution under such federal, state or local laws. During the third quarter of 1993, the Company was designated as a PRP in such federal, state, local or private proceedings for three additional sites. At September 30, 1993, a total of 40 such PRP designations remained unresolved by the Company, some of which designations the Company believes to be erroneous. The Company has established reserves for its Superfund (and similar state, local and private action) contingent liabilities which are reflected in the financial statements. The Company believes these reserves are adequate to cover these liabilities and are not material to the financial position or results of operations of the Company. In addition, based upon information presently available to the Company, and without regard to the application of insurance, the Company believes that, considered in the aggregate, the additional costs associated with such contingent liabilities, including any related litigation costs, will not have a materially adverse effect on the Company's financial position or results of operations.

The 1990 Clean Air Act Amendments (Act) provide that the EPA will issue regulations on a number of air pollutants over a period of years. Until these regulations are developed, the Company cannot determine the extent the Act will affect it. The Company anticipates

that its sources to be regulated will include glass fiber manufacturing, resin manufacturing and asphalt processing activities. The Company currently expects glass fiber manufacturing to be regulated by 1997. Based on information now known to the Company, including the nature and limited number of regulated materials it emits, the Company does not expect the Act to have a material adverse effect on the Company's results of operations, financial condition, or longterm liquidity.

FUTURE REQUIRED ACCOUNTING CHANGE

The Company has estimated that the foreign portion of Financial Accounting Standard No. 106, "Employers' Accounting for Postretirement Benefits Other Than Pensions", will be a charge of less than $30 million. Adoption of the foreign portion is required for 1995 financial reporting.

In November 1992, the Financial Accounting Standards Board issued Statement of Financial Accounting Standards No. 112, "Employers' Accounting for Postemployment Benefits" (SFAS No. 112). This standard requires employers to recognize the obligation to provide benefits to former or inactive employees after employment but before retirement under certain conditions. The obligation should be recognized if it is attributable to employees' service already rendered, the rights to these benefits accumulate or vest, payment of the benefits is probable and the amount can be reasonably estimated. SFAS No. 112 is effective for the Company beginning in 1994. The impact of SFAS No. 112 on the Company in the year of adoption has not been estimated at this time.

PART II. OTHER INFORMATION

ITEM 1. LEGAL PROCEEDINGS

See the paragraphs in Note 7, Contingent Liabilities, to the Consolidated Financial Statements above, which are incorporated here by reference.

ITEM 2. CHANGES IN SECURITIES

(a) None of the constituent instruments defining the rights of the holders of any class of the Company's registered securities was materially modified in the quarter ended September 30, 1993.

(b) None of the rights evidenced by any class of the Company's registered securities was materially limited or qualified in the quarter ended September 30, 1993 by the issuance or modification of any other class of securities.

ITEM 3. DEFAULTS UPON SENIOR SECURITIES

(a) During the quarter ended September 30, 1993, there was no material default in the payment of principal, interest, sinking or purchase fund installments, or any other material default not cured within 30 days, with respect to any indebtedness of the Company or any of its significant subsidiaries exceeding 5 percent of the total assets of the Company and its consolidated subsidiaries.

(b) During the quarter ended September 30, 1993, no material arrearage in the payment of dividends occurred, and there was no other material delinquency not cured within 30 days, with respect to any class of preferred stock of the Company which is registered or which ranks prior to any class of registered securities, or with respect to any class of preferred stock of any significant subsidiary of the Company.

ITEM 4. SUBMISSION OF MATTERS TO A VOTE OF SECURITY HOLDERS

No matter was submitted to a vote of security holders during the quarter ended September 30, 1993.

ITEM 5. OTHER INFORMATION

The Company does not elect to report any information under this item.

ITEM 6. EXHIBITS AND REPORTS ON FORM 8-K(a)

(a) Exhibits.

See Exhibit Index below, which is incorporated here by reference. (b) Reports on Form 8-K.

(b) Reports on Form 8-K.

The Company did not file any reports on Form 8-K during the quarter ended September 30, 1993.

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the Company has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized.

OWENS-CORNING FIBERGLAS CORPORATION
Registrant

By: /s/ David W. Devonshire
Senior Vice President
and Chief Financial Officer
(As both duly authorized officer
and principal financial officer)

Date: November 15, 1993

The exhibits filed with this quarterly report on Form 10-Q, except for Exhibit (11), "Computation of Per Share Earnings", and Exhibit (99), "Subsidiaries of Owens

Corning Fiberglas Corporation", have been omitted from this copy. The Company will provide a copy of these exhibits to any person who requests one. Requests should be addressed to Diane Dunmeade, Inquiry Department, Owens-Corning Fiberglas Corporation, Document Center 3, 801 Washington, Toledo, Ohio, 43624.

EXHIBIT INDEX

Exhibit Number (4)
Document Description:

Instruments Defining the Rights of Security Holders, Including Indentures.

Credit Agreement, dated as of November 2, 1993, among Owens-Corning Fiberglas Corporation, the Banks listed on Annex A thereto, and Credit Suisse, as Agent for the Banks (filed herewith).

Exhibit Number (10)
Document Description:

Material Contracts.

Credit Agreement, dated as of November 2, 1993, among Owens-Corning Fiberglas Corporation, the Banks listed on Annex A thereto, and Credit Suisse, as Agent for the Banks (filed as Exhibit (4) to this quarterly report on Form 10-Q).

Credit Agreement, dated as of July 30, 1987, among Owens-Corning Fiberglas Corporation, the Banks listed on Annex A thereto, and Credit Suisse, as Agent for the Banks, as amended and restated as of December 15, 1991 (incorporated herein by reference to Exhibit (4) to the Company's annual report on Form 10-K for 1991), as amended by Amendment 1 thereto (incorporated herein by reference to Exhibit (19) to the Company's quarterly report on Form 10-Q for the quarter ended March 35, 1992).

Rights Agreement, dated as of December 18, 1986, between Owens-Corning Fiberglas Corporation and Manufacturers Hanover Trust Company, as Rights Agent, including, as Exhibit B of such Rights Agreement, the form of Right Certificate (incorporated herein by reference to Exhibits 1 and 2 to the Company's Registration Statement on Form 8-A, dated December 23, 1986).

Owens-Corning Fiberglas Corporation Director's Charitable Award Program (filed herewith).

Owens-Corning Fiberglas Corporation Executive Supplemental Benefit Plan, ns amended (incorporated herein by reference to Exhibit (10) to the Company's quarterly report on Form 10-Q for the quarter ended March 31, 1993).

1993 Corporate Incentive Plan — General Terms (incorporated herein by reference to Exhibit (10) to the Company's annual report on Form 10-K for 1992).

Employment Agreement, dated as of December 55, 1991, with Glen H. Hiner (incorporated herein by reference to Exhibit (10) to the Company's annual report on Form 10-K for 1991), as amended by First Amending Agreement made as of April 1, 1992 (incorporated herein by reference to Exhibit (19) to the Company's quarterly report on Form 10-Q for the quarter ended June 30, 1992).

Owens-Corning Fiberglas Corporation Stock Performance Incentive Plan (incorporated herein by reference to Exhibit (19) to the Company's quarterly report on Form 10-Q for the quarter ended June 30, 1992).

Owens-Corning Fiberglas Corporation 1987 Stock Plan for Directors, as amended (incorporated herein by

reference to Exhibit (19) to the Company's quarterly report on Form 10-Q for the quarter ended March 31, 1992).

Form of Key Management Severance Benefits Agreement (senior Leaders) (incorporated herein by reference to Exhibit (10) to the Company's annual report on Form 10-K for 1991).

Consulting Agreement, dated September 27, 1990, with William W. Boeschenstein (incorporated herein by reference to Exhibit (10) to the Company's annual report on Form 10-K for 1990).

Owens-Corning Fiberglas Corporation 1986 Equity Partnership Plan, as amended (incorporated herein by reference to Exhibit (19) to the Company's quarterly report on Form 10-Q for the quarter ended March 31, 1988), as amended by Amendment 1 thereto (incorporated herein by reference to Exhibit (19) to the Company's quarterly report on Form 10-Q for the quarter ended March 31, 1989), by Amendment 2 thereto (incorporated herein by reference to Exhibit (10) to the Company's annual report on Form 10-K for 1989) and by Amendment 3 thereto (incorporated herein by reference to Exhibit (10) to the Company's annual report on Form 10-K for 1990).

The following documents are incorporated herein by reference to Exhibit (10) to the Company's annual report on Form 10-K for 1989:

–Pension Agreement,
dated April 16, 1984, with William W. Colville.

–Form of Directors' Indemnification Agreement.

–Form of Key Management
Severance Benefits Agreement.

The following documents are incorporated herein by reference to Exhibit (10) to the Company's annual report on Form 10-K for 1987:

–Owens-Corning Fiberglas Corporation Officers Deferred Compensation Plan.

–Owens-Corning Fiberglas Corporation Deferred Compensation Plan for Directors, as amended.

Exhibit Number (11)

Document Description:

Statement re Computation of Per Share Earnings (filed herewith).

Exhibit Number (99)

Document Description:

Additional Exhibits.

Subsidiaries of Owens-Corning Fiberglas Corporation, as amended (filed herewith).

COMPUTATION OF PER SHARE EARNINGS

	For the Quarter Ended September 30,		For the Nine Months Ended September 30,	
	1993	1992	1993	1992
	(In millions of dollars, except share data)			
Primary:				
Net Income	$48	$ 32	$98	$59
Weighted average number of shares outstanding (thousands)	42,767	42,010	42,637	41,879
Weighted average common equivalent shares (thousands):				
Deferred awards	303	649	308	672
Stock options using average market price	603	448	577	430
Primary weighted average number of common shares outstanding and common equivalent shares (thousands)	43,673	43,107	43,522	42,981
Primary per share amount	$ 1.09	$.75	$ 2.25	$1.36
Fully Diluted:				
Net Income	$ 50	$35	$ 104	$66
Weighted average number of shares outstanding (thousands)	42,767	42,010	42,637	41,879
Weighted average common equivalent shares (thousands)				
Deferred awards	303	650	308	672
Stock options using the higher of average market price or market price at end of period	617	461	598	457
Shares from assumed conversion of debt	5,798	5,798	5,798	5,798
Fully diluted weighted average number of common shares outstanding and common equivalent shares (thousands)	49,485	48,919	49,341	48,806
Fully diluted per share amount	$ 1.01	$ .71	$ 2.11	$ 1.35

EXHIBIT (99)

Subsidiaries of Owens-Corning Fiberglas Corporation (09/30/93)	*State or Other Jurisdiction Under the Laws of Which Organized*
Barbcorp, Inc.	Delaware
Dansk-Svensk Glasfiber A/S	Denmark
Deutsche Owens-Corning Glasswool GmbH	Germany
Eric Company	Delaware
European Owens-Corning Fiberglas	Belgium
Fiberglas Canada Inc.	Canada
Fiberglas Comercial Exportadora e Importadora Ltda.	Brazil
IPM Inc.	Delaware
Matcorp, Inc.	Delaware
N.V. Owens-Corning S.A.	Belgium
OCFIBRAS Limitada	Brazil
O/C/FIRST CORPORATION	Ohio
OCFOGO, Inc.	Delaware
OCFSC, Inc.	U.S. Virgin Islands
O.C. Funding B.V.	The Netherlands
O/C/SECOND CORPORATION	Delaware
Owens-Corning Cayman Limited	Cayman Islands
Owens-Corning Fiberglas Deutschland GmbH	Germany
Owens-Corning Fiberglas Espana, S.A.	Spain
Owens-Corning Fiberglas France, S.A.	France
Owens-Corning Fiberglas (G.B.) Ltd.	United Kingdom
Owens-Corning Fiberglas (Italy) S.r.l.	Italy
Owens-Corning Fiberglas Limitada	Brazil
Owens-Corning Fiberglas Norway A/S	Norway
Owens-Corning Fiberglas S.A.	Uruguay
Owens-Corning Fiberglas Sweden AB	Sweden

Subsidiaries of Owens-Corning Fiberglas Corporation (09/30/93)	*State or Other Jurisdiction Under the Laws of Which Organized*
Owens-Corning Fiberglas Technology Inc.	Illinois
Owens-Corning Fiberglas (U.K.) Ltd.	United Kingdom
Owens-Corning Holdings Limited	Cayman Islands
Owens-Corning Isolation France S.A.	France
Owens-Corning (Overseas) Management Limited	Cyprus
Owens-Corning Real Estate Corporation	Ohio
Owens-Corning Rohre GmbH	Germany
Owens-Coming Veil Netherlands B.V.	The Netherlands
Owens-Corning Veil U.K., Ltd.	United Kingdom
Owens-Corning Veroc Technology A/S	Norway
Owens-Corning Vertriebs GmbH	Germany
Palmetto Products, Inc.	Delaware
Scanglas Ltd.	United Kingdom
Willcorp, Inc.	Delaware
Wrexham A.R. Glass Ltd.	United Kingdom

(2)

No. 93-1137

FEB 11 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

v.

JOHN KOCHAN, CLARENCE GRANGER AND HILMA GRANGER, HERMAN DAVIS AND ELIZABETH DAVIS, HARRY RENEAU AND ARVADA RENEAU, CLARENCE WOODWARD AND URSEL WOODWARD,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court of Illinois, Fifth District

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. DOES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PROVIDE DEFENDANTS IN MASS TORT CASES WITH A SUBSTANTIVE RIGHT TO AVOID THE ASSESSMENT OF SUCCESSIVE PUNITIVE DAMAGE AWARDS, IN THE ABSENCE OF PROOF THAT THE DEFENDANT HAS ACTUALLY PAID PUNITIVE DAMAGES FOR THE SAME ACTIONS?

II. DO THE ILLINOIS RULES FOR REVIEWING PUNITIVE DAMAGE AWARDS FOR EXCESSIVENESS, WHICH PROVIDE FOR FULL APPELLATE REVIEW BUT CONFINE APPELLATE CONSIDERATION OF THE FACTS TO MATTERS OF RECORD AT THE TIME OF JUDGMENT, VIOLATE DEFENDANTS' RIGHTS TO PROCEDURAL DUE PROCESS?

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STATEMENT OF THE CASE

This is a products liability case brought in Illinois and governed by Illinois procedural and substantive law. Respondents, five victims of asbestos-related diseases and the wives of four of them, brought five separate suits in Madison County, Illinois against petitioner Owens-Corning Fiberglas Corporation ("OCF") and numerous other manufacturers of asbestos-containing products, claiming compensatory damages. The cases were consolidated for discovery, for trial, and ultimately for appeal.

Prior to trial, respondents moved for leave to claim punitive damages against certain defendants in the case, including OCF, pursuant to Ill.Rev.Stat., ch. 110, par. 2-604.1 (1989). That statute provides that a plaintiff may not allege entitlement to punitive damages in a pleading unless the plaintiff moves for leave of court to do so and establishes at a pre-trial evidentiary hearing "a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages." *Id.* The defendants, including OCF, resisted the motion. Significantly, however, although punitive damages had been alleged and awarded against OCF in other products liability actions involving its manufacture and sale of asbestos products, OCF chose not to reveal those awards to the trial court and decided not to argue that the aggregate amount of such awards provided a substantive due process bar against the award of punitive damages in this case. Following a lengthy hearing, the trial court granted the motion and allowed respondents to seek punitive damages from OCF and several other defendants.

Respondents proceeded to trial against OCF in October of 1990, having settled with all other defendants. All of the five respondents who had sustained an asbestos-related illness presented proof that their disabling injuries were caused by occupational exposure to OCF asbestos products. Respondents also submitted proof that in marketing the products to which respondents were exposed, OCF had, in the words of the Illinois Appellate Court, exhibited "an utter indifference to, or conscious disregard for the safety of others," A-19, warranting the imposition of punitive damages under Illinois law. Specifically, the Illinois Appellate Court observed that respondents' evidence

> showed that defendant was aware of the hazards of asbestos, chose not to disclose the information, and failed to place warning labels on the product at the time that it knew of the hazards of the product. In fact, defendant apparently chose to stockpile the information in the event that it could be beneficial in marketing other products.

A-18-19. At the close of the trial, OCF moved for a directed verdict on the issue of punitive damages. OCF offered no evidence at this time, though, that it had been assessed punitive damages in any other cases. The trial court denied OCF's motion, and submitted respondents' claims for compensatory and punitive damages to the jury.

The jury returned a verdict awarding substantial compensatory damages to each injured respondent and his wife, ranging from $138,000.00 to $480,000.00. The jury also awarded each respondent $1 million in punitive

damages. The trial court entered judgment on the jury's verdict.

OCF then filed a post-trial motion seeking judgment notwithstanding the verdict or a remittitur of the punitive damages awards. In support of that motion, OCF argued that the awards should be reduced or set aside in their entirety because OCF had been adequately punished by other punitive damages awards assessed for the manner in which it marketed its asbestos products. In order to provide some factual support for its claim that it had been punished enough, OCF submitted the affidavit of one of its in-house lawyers, "litigation counsel" Robert A. McOmber.

The trial court denied OCF's post-trial motion. In a written order, A-48-55, the court initially explained that OCF had waived its argument that OCF's liability for punitive damages in other cases required nullification or reduction of the awards in this case, noting that "this argument was not made at the time of trial" and that "the McOmber affidavit was not filed at the time of trial." A-53.

Notwithstanding its ruling regarding OCF's waiver, the trial court fully considered, and completely rejected, the merits of OCF's argument, giving two reasons for its decision. First, the trial court explained that, contrary to OCF's "claim that [it] ha[d] already been punished sufficiently," A-53, the facts alleged in the McOmber affidavit filed in support of that claim did more to undercut than to support the claim:

> [W]hile OCF lists several prior punitive awards in the McOmber affidavit, in only one case does

> OCF claim to have *paid* punitive awards. A party cannot be excessively punished with a mere verdict and judgment. Punishment only occurs when payment is made.

A-53 (emphasis in original).

Second, the trial court noted that the McOmber affidavit did not describe "what evidence was presented in those other cases resulting in punitive awards," and stated that it was unwilling to "guess[ ] about what conduct led to the awards." *Id.* The trial court therefore concluded that OCF had failed to demonstrate that it had in fact been punished for the same course of conduct upon which the punitive awards in the instant case were based, and, accordingly, rejected OCF's post-trial attack on the punitive awards as being "without merit even in the absence of waiver." A-54.[1]

On appeal to the Illinois Appellate Court, Fifth District, OCF argued, *inter alia*, that the trial court's rulings abridged its rights to substantive and procedural due process guaranteed by the Fourteenth Amendment. In that court, as in this one, OCF insisted that it had the substantive due process right to be immune from multiple awards of punitive damages for the same course of conduct and asserted that the McOmber affidavit had provided ample evidence that multiple punishments had, in fact, been imposed on OCF for what was, in fact, the same course of conduct. The Illinois Appellate Court

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[1] OCF's representation in its petition that the trial court denied OCF's post-trial motion to vacate or reduce the punitive awards "without discussing the merits of this issue," Pet. at 5, is thus demonstrably false.

rejected that contention, ruling that far from presenting ample evidence of violations of substantive due process, OCF had failed to present any evidence of such violations, at least no evidence "until after the trial," A-28, that is, when OCF tendered the McOmber affidavit in support of its motion for a JNOV. Nevertheless, although the Illinois Appellate Court found it unnecessary to consider whether the Fourteenth Amendment bars multiple punitive damages awards, that court emphasized that defendants are safeguarded against multiplicative and therefore excessive awards of punitive damages as a matter of state law. A-28-29, citing *Hazelwood v. Illinois Central Gulf Railroad*, 114 Ill.App.3d 703, 71 Ill.Dec. 320, 450 N.E.2d 1199 (Ill.App. 4th Dist. 1983).

OCF also claimed that Illinois' standards for post-trial and appellate review of punitive damages awards do not comport with the procedural due process requirements comprised in the Fourteenth Amendment. The Illinois Appellate Court unanimously disagreed, holding that "post-trial and appellate review in Illinois does provide a meaningful constraint on the jury." A-25. That court noted that the applicable Illinois statute expressly authorizes a trial court to order a remittitur and conditional new trial upon finding that a punitive damages award is excessive. A-26, citing Ill.Rev.Stat. ch.110, par. 2-1207 (1989). The Illinois Appellate Court also stressed that Illinois has expressly recognized the obligation of its appellate courts to review punitive damages awards for excessiveness, and specifically requires appellate courts to consider, among other factors, "the enormity of the wrong, the defendant's financial status, and the potential liability of the defendant," in considering whether a

punitive damages award is excessive. A-26, citing *Hazelwood, supra.* Finally, the Illinois Appellate Court observed that Illinois' procedures for screening punitive damages claims prior to trial, codified in Ill.Rev.Stat. ch. 110, par. 2-604.1 (1989), provide defendants with additional protection from punitive damages claims that may be unwarranted or excessive. A-26-27. The appellate court concluded that Illinois' procedures for protecting defendants from unreasonable punitive damages awards are "constitutionally sufficient." A-26.

Accordingly, the Illinois Appellate Court unanimously affirmed the trial court's refusal to disturb the punitive damages awards.

OCF then petitioned the Illinois Supreme Court for leave to appeal. That court stayed its consideration of OCF's petition pending this Court's decision in *TXO Production Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711 (1993). Following the issuance of *TXO*, the Illinois Supreme Court unanimously denied OCF's petition.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD NOT GRANT REVIEW TO CONSIDER OCF'S SUBSTANTIVE DUE PROCESS ARGUMENT.

A. The Court Has Repeatedly Denied Petitions for Certiorari Raising Virtually Identical Questions, Including a Petition Filed Earlier This Term by OCF.

OCF first urges this Court to grant certiorari to consider whether a defendant who has been found guilty of

inflicting numerous injuries through the mass marketing of defective products over many years enjoys protection from multiple punitive damages awards as a matter of substantive due process. OCF contends that mass tortfeasors enjoy such rights, especially "*where* the aggregate amount of the punitive damages awarded is greater than is reasonably necessary to punish and deter," Pet. at 6 (emphasis added), "*where* society's goals of punishment and deterrence have been fully served," Pet. at 7 (emphasis added), "*where* the punishment is disproportionate to the defendant's culpability," Pet. at 8 (emphasis added), *where* "the retributive function normally fulfilled by punitive awards has been fully satisfied by the punitive amount of compensatory damages awarded in thousands of cases," Pet. at 9, and *where* the "thousands of cases brought by plaintiffs who claim injuries aris[e] out of the same general course of conduct," Pet. at 6.

The question presented is a familiar one – to both the Court and to OCF. Indeed, OCF raised virtually the same question in a petition for certiorari filed less than five months ago and denied without dissent by this Court less than two months ago. *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir.) (en banc), *cert. denied sub nom., OCF Corp. v. Dunn* (No. 93-658), 62 U.S.L.W. 3407 (U.S. Dec. 14, 1993). It is interesting to note that although this Court denied OCF's petition for certiorari in *Dunn* on December 13, *more than three weeks before the instant petition was filed*, OCF concealed that fact from this Court, going as far as to cite that case merely as "*Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir. 1993)." *See, e.g.*, Petitioner's Table of Authorities at *vii* and Pet. at 3, n.1.

The substantive due process question presented in the instant petition has been, to be sure, *styled* somewhat differently than the question presented in the petition that was filed by OCF on October 25, 1993 and denied by the Court on December 13, 1993 – chiefly by substituting one adverb for another ("where" for "when"), by combining three questions into one, and by rearranging key phrases.[2] As a matter of substance, however, the questions presented in OCF's multiple petitions are essentially identical.

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[2] The substantive due process questions presented in OCF's petition in *Dunn* were:

> (1) Do additional awards of punitive damages in mass tort litigation become constitutionally excessive under the Due Process Clause *when* defendant's *liability for compensatory damages* and other expenses (including other punitive damages awards) *will itself suffice to inflict whatever punishment and deterrence might be necessary* – and *when* further punitive damages awards could jeopardize future plaintiffs' ability to obtain compensation for their injuries?
>
> (2) Do additional awards of punitive damages in mass tort litigation violate the Due Process Clause *when* defendant is being *punished repeatedly* and without limitation *for a single course of conduct*?
>
> (3) Do additional awards of punitive damages in mass tort litigation violate the Due Process Clause *when* punitive damages are *no longer needed to punish and deter* defendant and *when* they constitute *repetitive and unlimited punishment for the same course of conduct*?

OCF's Petition for Certiorari, No. 93-658 (filed Oct. 25, 1993, 62 U.S.L.W. 3399 (U.S. Dec. 7, 1993)) in *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir.) (en banc), *cert. denied sub nom., OCF Corp. v. Dunn* (No. 93-658), 62 U.S.L.W. 3407 (U.S. Dec. 14, 1993) (emphasis added).

Nor are the questions presented by OCF in this case and in *Dunn* themselves original and uncommon; at least *eight similar petitions have been filed in the past four years* by OCF's fellow asbestos manufacturers (and OCF's co-defendants in numerous cases). Each of these previously-filed petitions has asked the Court to hold that the Due Process Clause protects mass tort defendants from the imposition of multiple punitive damages awards; significantly, the Court has denied review in every case.[3]

OCF has not explained why it has filed two fundamentally interchangeable petitions within months of each other, or why the second petition, the instant petition, fails to mention that the first was filed with, and denied by, this Court; certainly, OCF has not cited any intervening development – such as a pertinent decision by this Court or by any other court – that justifies its decision to burden this Court with duplicative petitions. It seems, though, that OCF passionately believes in the rightness of its cause and passionately believes that this Court has a duty to fashion a "national solution" (curiously suggesting that the Court should fashion one along the lines of *Miranda v. Arizona*, 384 U.S. 436 (1966), *Escobedo v. Illinois*,

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[3] *Fibreboard Corp. v. Pool*, 813 S.W.2d 658 (Tex.Ct.App. 1991), *cert. denied*, 113 S.Ct. 3064 (1992); *Owens-Illinois, Inc. v. Bolyard*, 113 S.Ct. 462 (1992); *Keene Corp. v. Adams*, 113 S.Ct. 462 (1992); *Solly v. Manville Asbestos Disease Fund*, 966 F.2d 1454 (6th Cir.), *cert. denied sub nom., Owens-Illinois, Inc. v. Roby*, 113 S.Ct. 411 (1992); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1778 (1992); *King v. Armstrong World Indus., Inc.*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2236 (1991); *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277 (2d Cir.), *cert. dism'd*, 497 U.S. 1057 (1990); *Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir.), *cert. denied*, 498 U.S. 920 (1990).

378 U.S. 436 (1964) and *Mapp v. Ohio*, 367 U.S. 643 (1961), Pet. at 13, and the Court's interstate commerce cases, Pet. at 14) in order "to prevent the continued violation of the constitutional rights of corporate defendants in mass tort litigation." Pet. at 13.

Evidently, OCF also believes, with equal fervor, some other things: that the Court's previous rulings were in error; that the Court does not sufficiently appreciate the gravity of the "national" crisis bedeviling multiple tortfeasors and does not adequately comprehend the "critical need for the Court's intervention," Pet. at 14; that "[t]his Court must shoulder the responsibility for preventing repeated awards of punitive damages for the same acts or series of acts," Pet. at 13; and that the Court must no longer duck the issue, that is, "[t]his Court should delay no further in addressing the[se] due process concerns . . . ." Pet. at 4.[4]

In short, OCF passionately insists that, this time, the Court must get it right. Respondents respectfully submit that the Court has gotten it right all along.

B. Even If the Instant Petition Did Not Duplicate Arguments Just Recently Rejected by the Court, a Grant of Certiorari Would Still Not Be Warranted Because the Cases Cited by OCF Do Not Support Its Arguments.

OCF's failures to inform the Court about the Court's recent disposition of OCF's petition in that case and to

---

[4] Thus, OCF admonishes the Court to jettison the principles of judicial restraint in order to contrive a cure for this momentous national crisis, *viz.*: " '[i]t is judicial paralysis, not activism, that is the problem in this area.' " Pet. at 4, quoting *Dunn*, *supra*, at 1399 (Weis, J., dissenting).

cite it accurately in the instant petition are compounded by its inability to distinguish between the holding and the dissent in *Dunn*, repeatedly citing the latter as if it were the former. Thus, although OCF cites *Dunn* as supporting the proposition that "at some point multiple punitive damages awards in mass tort cases exceed [the purpose of punishment and deterrence] and violate due process," Pet. at 3 n.1, the majority in *Dunn* actually concluded that "multiple punitive damages awards are not inconsistent with the due process clause." 1 F.3d at 1386. *See also* Pet. at 14. Similarly, OCF either misapprehends or misrepresents the other cases cited for the same proposition.

Indeed, OCF's misplaced reliance on the dissent in *Dunn* is telling. OCF has not found a single reported case from any jurisdiction in which a court has struck down or reduced a punitive damages award on the ground that, under the Fourteenth Amendment's Due Process Clause, the defendant had already been punished enough by other awards. On the other hand, at least three federal circuits and three state supreme courts have rejected in reported opinions arguments by defendants in asbestos cases that the punitive damages awards in those cases should be vacated or reduced because such awards constitute repetitive punishment in violation of defendants' rights to substantive due process.[5] Far from showing a

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[5] *See Dunn, supra* (Third Circuit), *Glasscock, supra* (Fifth Circuit), and *Simpson, supra* (Second Circuit); *Spaur v. Owens-Corning Fiberglas Corp.*, No. 92-1452, 1994 WL 14381 (Iowa Jan. 19, 1994), at *11-*15; *Davis v. Celotex Corp.*, 420 S.E.2d 557, 565-66 (W.Va. 1992); *Eagle-Picher Indus., Inc. v. Balbos*, 604 A.2d 445, 472 (Md. 1992).

conflict among the lower courts on this issue, the decisions across the country are remarkable in their consistency. Exercise of this Court's discretionary power of review is therefore unwarranted under Sup.Ct.R. 10.

C. The Record in This Case Does Not Support the Question Presented; Even Assuming the Existence of the Substantive Due Process Right Claimed by OCF, That Right Would Not Be Implicated Under the Facts of This Case.

The relief that OCF requests requires both recognition of a new substantive constitutional right to avoid the imposition of multiple punitive damages awards *and* a factual determination that OCF has been punished enough by prior punitive damages awards to deserve this constitutional protection. As in *Dunn* and the other previous cases in which the Court has denied certiorari, OCF is unable to present this Court with record evidence that would support a factual determination that it has been "punished enough" for injuring thousands of persons exposed to its dangerous products and "punished enough" to deter other potential tortfeasors from similar misconduct in the future.

In the end, OCF's substantive due process argument rests on three factual assumptions, none of which are supported by the record: one, that OCF actually has paid multiple punitive damages awards; two, that such awards arose from the same course of conduct; and three, that the

aggregate amount of such awards is " 'greater than reasonably necessary to punish and deter.' " Pet. at 12, *quoting Pacific Mut. Life Ins. Co. v. Haslip*, 113 L.Ed.2d 1, 23 (1991).

First, OCF has not produced, either inside or outside the trial record, any evidence allowing the Court to conclude that punitive damages actually have been *imposed on* and *paid by* OCF for its conduct in knowingly mass-marketing hazardous asbestos products. As the trial court pointed out, A-53, the belatedly filed McOmber affidavit indicates that at the time of judgment, OCF had actually paid only one punitive damages award. *See* McOmber affidavit at A-94.[6]

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[6] The McOmber affidavit is quite telling, but in ways unintended by OCF. According to the McOmber affidavit, during the 32 year period from May 1958 through November 1990, "substantial punitive damages jury *verdicts*" (which that affidavit defines as verdicts awarding punitive damages in amounts of $100,000 or more) "have been awarded against OCF", A-92, in only eight cases, A-93-96, with non-substantial punitive damages, *i.e.*, between $8,000 and $25,000, being awarded in three additional cases. A-96-97.

Of the eleven (11) cases cataloged in the McOmber affidavit as cases in which awards of punitive damages totaled $8,000 or more, OCF had negotiated post-verdict settlements in four cases (*Davis v. OCF, Gizzi v. OCF, Schoenian, Harler and Tusic v. OCF*, A-94-96, and *Barry v. OCF*, A-96), punitive damages awards had been reversed or set aside in two cases (*Coles v. OCF* and *Marcelli v. OCF*, A-97), jury verdicts had not been reduced to judgments in two cases (*Adams, et al. v. OCF* and *Barnes, et al. v OCF*, A-95-96), and post-trial motions or appeals were either being contemplated or were pending in the remaining three cases (*Watson v. OCF, Reneau, et al. v. OCF*, and *Dunn v. OCF*, A-94-95).

Indeed, notwithstanding Mr. McOmber's concluding (and conclusory) assertion that "OCF has already paid millions in

Second, OCF has not produced, either inside or outside the trial record, any evidence that the punitive damages actually assessed against OCF arose from the same course of conduct. As the trial court noted, the McOmber affidavit did not describe "what evidence was presented in those other cases resulting in punitive awards," A-53, and therefore declared that it was unwilling to "guess[ ] about what conduct led to the awards." *Id.*

Third, the question presented requires the Court to assume that the aggregate punishment inflicted on OCF is " 'greater than reasonably necessary to punish and deter.' " OCF has failed, though, to provide this Court or the courts below any facts sufficient to reach such a conclusion. Certainly the Illinois Appellate Court did not believe the awards to respondents to exceed the amount

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dollars in punitive damages for what was a single course of conduct," A-97, his affidavit enumerates only one such payment, a payment of $1.2 million to the plaintiff in *Gizzi v. OCF*, A-94, which represented 60% of the $2 million in punitive damages awarded by a jury. *Id.*

Moreover, although the McOmber affidavit lists cases from other jurisdictions in which juries awarded punitive damages against OCF allegedly arising out of "[t]he same course of conduct" that provided the basis for the punitive damages awards in the instant case, the McOmber affidavit does not describe with any particularity the proof supporting the punitive damages awards in other cases.

Finally, the largest award of punitive damages identified in the McOmber affidavit was subsequently reduced by the trial court from $25 million to $2 million, and then further reduced on appeal to $1 million. *See Dunn v. HOVIC*, 1 F.3d 1371, 1391 (3d Cir.) (*en banc*), *cert. denied sub nom., OCF Corp. v. Dunn*, 114 S.Ct. 650 (1993), described in the McOmber affidavit at A-93, A-95.

necessary to punish OCF and to deter OCF *and others* from similar misbehavior; it expressly found that the punitive damages awards assessed against OCF "for willfully and wantonly causing five persons to suffer asbestosis" were appropriate punishment and thus did " 'not cross the line into the area of constitutional impropriety.' " A-28, quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 24 (1991).

Furthermore, the financial "evidence" that OCF has sought to introduce in this Court, for the first time in this case, undercuts rather than supports OCF's claim that it has been or soon might be the victim of "overkill." Pet. at 19. Although to this Court, OCF has pleaded that its fortunes are at low ebb and that its prospects are dire unless the Court fashions a final, "national solution" to the asbestos crisis, OCF has been telling a different tale to its investors and to the SEC.

Thus, OCF's 1993 Third-Quarter Report, Form 10-Q, dated Nov. 15, 1993, and attached as A-117-153 to the Petition, discloses that OCF's management has few fears for OCF's future and that it does not regard OCF's past, pending, or prospective asbestos-related legal obligations, including the payment of punitive damages, as cause for any concern. Indeed, OCF's 1993 Third-Quarter Report, Form 10-Q assures that:

> in the opinion of management, the additional uninsured and unreserved costs which may arise out of pending personal injury and property damages asbestos claims and additional similar asbestos claims filed in the future will not have a materially adverse effect on [OCF's] financial position. While such additional uninsured and unreserved costs incurred in and after

> the year 2000 may be substantial over time, management believes that any such additional costs will not impair the ability of [OCF] to meet its obligations, to reinvest in its business or to take advantage of attractive opportunities for growth.

Id. at A-135.

To grant the relief that OCF seeks, the Court would have to determine, as a factual matter, that the punitive damages that OCF paid prior to the entry of judgment are sufficient to punish OCF for the harm that it has inflicted on the entire population of persons injured by its asbestos products. As the trial court noted, A-53, neither the aggregate amount of punitive damages awards that OCF has previously paid nor the conduct sought to be punished and deterred by such awards is adequately demonstrated in the record. Thus, even if the Fourteenth Amendment confers on tortfeasors the substantive right to avoid multiple punitive damages assessments, OCF would not be entitled to that constitutional protection in this case.

D. Recognition of a New Substantive Due Process Right To Avoid the Imposition of Multiple Punitive Damages Is Unnecessary To Protect Defendants from Excessive Punitive Damages Awards.

This Court has clearly held that the Due Process Clause protects defendants from "grossly excessive" punitive damages awards. *TXO*, 113 S.Ct. at 2720. The Court has just as clearly declined, however, to draw "a mathematical bright line between the constitutionally

acceptable and the constitutionally unacceptable that would fit every case." *Haslip*, 499 U.S. at 18; *TXO*, 113 S.Ct. at 2720. Informing this refusal has been the Court's recognition that punitive damages awards are properly "the product of numerous, and sometimes intangible, factors." *TXO*, 113 S.Ct. at 2720. Yet OCF insists that the Court must draw a bright line, by asking the Court to enshrine the defendants' actual and potential liability for punitive damages in other cases as a "factor" of constitutional dimension.

Whether, and the extent to which, a defendant that has been found guilty of a mass tort should be granted specific protection from multiple punitive damages awards is a policy matter best left state courts and legislatures. If, as OCF claims, "a national solution is necessary," Pet. at 13, the appropriate recourse for OCF is to petition Congress, not this Court. But the refusal of state courts and legislatures, and Congress, to implement the policy that OCF advocates "does not authorize the federal judiciary to assume for itself the responsibility for formulating what essentially are legislative solutions." *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 415 (5th Cir.), *cert. denied*, 478 U.S. 1022 (1986). Control of punitive damages in mass tort cases "may well be wise, but it is not the role of the Due Process Clause," which "carries no mandate for particular measures of reform." *Haslip*, 499 U.S. at 39 (Scalia, J., concurring). Thus, even if it were necessary to insulate defendants guilty of egregious mass torts from liability for multiple punitive damages, a necessity which respondents vigorously dispute, unprincipled and uncabined expansion of the Due Process Clause is not the way to achieve this result.

Moreover, whatever abstract need there might be for fabricating a new *constitutional* right, recognition of a constitutional right grounded in the Due Process Clause to be free from the imposition of multiple punitive damages awards is especially unwarranted on the facts presented on the record of this case. Illinois, like a growing number of other states,[7] expressly authorizes its reviewing courts to consider "the potential liability of the defendant" in determining whether a punitive damages award in a particular case is excessive. A-21-24; *Hazelwood v. Illinois Gulf Central R.R.*, 450 N.E.2d 1199, 1207 (Ill.App.Ct. 1983).[8] In the instant case, then, OCF did not

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[7] *See, e.g., Green Oil Co. v. Hornsby*, 539 So.2d 218, 223-24 (Ala. 1989), described in *Pacific Mut. Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991), authorizing Alabama courts to consider the existence of other civil awards against the defendant for the same conduct in reviewing a punitive award for excessiveness; Ga.Code Ann. par. 51-12-5.1(e) (Michie 1990), allowing only a single punitive award for all claims arising out of the same conduct; Mo.Ann.Stat. sec. 510.263(4) (Vernon 1952 & Supp. 1992), allowing defendant in a post-trial hearing to request credit for prior punitive damages awards arising from the same conduct.

[8] The *Hazelwood* court articulated three "factors which a[n] [Illinois] court should consider in determining whether a punitive damages award is excessive." *Hazelwood, supra*, 450 N.E.2d at 1207.

> The *first factor* is the nature and enormity of the wrong. While all acts which give rise to punitive damages are wilful and wanton, some of those acts are clearly more reprehensible than others. The egregiousness of the act should be reflected in the amount of the award. . . . Recognizing that punitive damages are in the nature of a criminal sanction, we are simply saying that the punishment should fit the

need the formulation of a new constitutional right to protect itself from repetitive, excessive punitive damages awards; it needed only to follow well-established Illinois procedure in bringing its proof to the court and the factfinder that any punitive damages award would be duplicative, excessive, or unnecessary. OCF's repeated

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> crime. An award which is disproportionate to the wrong serves none of purposes of punitive damages and is excessive.
>
> The *second factor* is the financial status of the defendant. Although an award so small that it would be only an ordinary item of expense does not serve the purposes of retribution and deterrence, and award which bankrupts the defendant is excessive. Punitive damages should be large enough to provide retribution and deterrence but should not be so large that the award destroys the defendant. Thus, before a court can gauge the award, it must first gauge the financial position of the wrongdoer. . . . Simply stated, the amount of the award should send a message loud enough to be heard but not so loud as to deafen the listener. A deafening award is excessive.
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> The *third factor* which should be considered is the potential liability of the defendant. This factor was noted in Comment *e* of section 908 of the Restatement of Torts [(Second)]:
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> > "Another factor that may affect the amount of punitive damages is the existence of multiple claims by numerous persons affected by the wrongdoer's conduct. It seems appropriate to take into consideration both the punitive damages that have been awarded in prior suits and those that might be granted in the future." 4 Restatement of Torts (Second), Section 908, comment *e* at 467 (1977).

Id. (emphasis in the original).

and unexplained failures to take advantage of the opportunities offered by existing procedures (and the consequences that flowed from OCF's tactical litigation decisions not to avail itself of these procedures) hardly warrants this Court's articulation of a new substantive due process right.

II. THE COURT SHOULD NOT GRANT REVIEW TO CONSIDER OCF'S PROCEDURAL DUE PROCESS ARGUMENT BECAUSE ILLINOIS' PROCEDURES FOR REVIEWING PUNITIVE DAMAGES AWARDS FULLY COMPORT WITH TRADITION, ARE NOT FUNDAMENTALLY UNFAIR, AND THEIR APPLICATION IN THIS CASE DID NOT DEPRIVE OCF OF PROCEDURAL DUE PROCESS.

During trial, OCF offered no evidence of its actual or potential liability for punitive damages in other asbestos cases. Its sole evidentiary support for its argument that it has been punished enough for causing injuries to respondents and tens of thousands of others exposed to its products is the affidavit of its counsel, which was attached to its post-trial motion. Both the trial court and the appellate court declined to consider the affidavit because it was offered for the first time after judgment.[9] The appellate court reasoned that the extent to which other punitive damages awards should affect the defendant's liability in a particular case should be decided in the first instance by the original factfinder, not the

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[9] The trial court nevertheless considered the evidence and held that it did not support OCF's claim that the punitive damages assessed in this case, coupled with the damages assessed in other cases, were excessive. A-53-54.

reviewing court. A-53. The court added that it would be unfair to consider the affidavit (which is, after all, hearsay) as probative evidence of OCF's potential liability for punitive damages in other cases; OCF's failure to produce the affidavit prior to trial prevented plaintiffs from assembling rebuttal evidence of OCF's potential punitive damage liability, and "plaintiffs cannot cross-examine an affidavit." A-53.

OCF now contends that by considering only the evidence produced at trial in reviewing the size of the punitive damage awards, the Illinois courts have denied OCF procedural due process. Of course, OCF cites no authority for its contention that the Constitution compels state courts reviewing punitive damages awards for excessiveness to admit and consider hearsay evidence offered for the first time after judgment. Instead, it notes that Alabama's procedure for reviewing punitive damages awards, adopted by that state in 1989,[10] allows post-trial submission of evidence, and suggests that the Court's approval of the Alabama procedure as *constitutionally adequate* in *Haslip* means that the procedure is *constitutionally required*.

It is frivolous for OCF to suggest, though, that *Haslip* adopts the Alabama procedures as a constitutional minimum. OCF cites no language from *Haslip* indicating that the procedures found adequate in that case are constitutionally required, and the Court has subsequently

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[10] The Alabama Supreme Court first suggested that its trial courts should conduct post-trial evidentiary hearings to facilitate review of punitive damage awards in *Green Oil Co. v. Hornsby*, 539 So.2d 218, 223-24 (Ala. 1989).

approved state procedures for reviewing punitive damage awards that are "far less detailed and restrictive than those upheld in *Haslip*." *TXO*, 113 S.Ct. at 2727 (Scalia, J., concurring). Nothing in *Haslip* intimates that the traditional rule limiting a reviewing court to consideration of the evidence actually introduced at trial violates due process. On the other hand, even where punitive damages are involved, the Court has been "reluctant to stray too far from traditional common-law standards, or to take steps which ultimately might interfere with the proper role of the jury." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). It is axiomatic, as Justice Kennedy observed in *TXO*, "that a jury verdict must be reviewed in relation to the record before it." 113 S.Ct. at 2725 (Kennedy, J., concurring). Yet the rule proposed by OCF *as a constitutional requirement* would strip the jury of its traditional function, and vest the authority for deciding the extent to which prior punitive damage awards should affect a punitive damages calculation solely with the reviewing judges. Nothing in this Court's opinions suggests that the Due Process Clause requires such an abrupt and complete departure from traditional common-law procedures.

Because it is certainly conceivable that a defendant's presentation of "overkill" evidence to the jury might increase the likelihood that the jury will return a substantial punitive damages award, a defendant's decision whether to present such evidence to the jury or to forego the "overkill" defense is a difficult one. But the choice is easier than OCF implies, at least under Illinois law. If OCF had introduced its "overkill" evidence at trial, or at least presented it to the trial court in a motion prior to

judgment, it would have been assured that the reviewing court, if not the jury, would have considered such evidence in mitigation of its liability for punitive damages. More importantly, neither this Court nor any other court has ever held that the Due Process Clause protects litigants from having to make tough strategic decisions; every day, litigants in other types of cases are forced to make similarly difficult tactical choices. A criminal defendant with a record, for example, must open himself up to damaging cross-examination or give up the right to testify in his own defense. A defendant with a statute of limitations defense in a latent injury case must either produce proof that the plaintiff is actually injured (and thus deprive itself of a "no damages" defense if the limitations defense is unsuccessful) or abandon the limitations defense. The Due Process Clause does not protect litigants from bad facts or hard choices.

Illinois law permitted OCF to submit its "overkill" evidence to the trial judge outside the presence of the jury in a number of ways. OCF could have presented its "overkill" evidence at the pretrial hearing on punitive damages conducted by the trial court pursuant to Ill.Rev.Stat., ch. 110, par. 2-604.1 (1989). It could have filed a motion for summary judgment, attaching the "overkill" evidence. It could have moved for leave to submit the evidence in camera. OCF did none of these things.[11]

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[11] Additionally, if OCF withheld its "overkill" evidence from the jury because it did not wish to couple an "overkill" argument with an argument that its conduct did not warrant the imposition of punitive damages at all, it could have moved for a bifurcated trial, with compensatory damages and liability for punitive damages determined in the first phase, and the amount

Instead, it waited until after judgment, then sought relief from reasonable punitive damages awards based on hearsay evidence that respondents had no fair opportunity to rebut.[12]

Illinois' procedures for reviewing punitive damages awards are traditional, detailed, and meaningful. They are also evidently effective in curtailing unjustified and

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of punitive damages determined in the second. OCF failed to make such a motion.

[12] Ironically, just as OCF waived its rights to present its "overkill" evidence at trial, so too, it compounded that first waiver in the trial court by a second waiver in the Illinois Appellate Court. Thus, OCF waived its right to raise its procedural due process argument in this Court by failing to raise and preserve that argument in the Illinois Appellate Court. Although OCF now seeks to cloak that second failure by asserting that the procedures it failed to follow *in the trial court* were newly *"adopted by the Illinois Appellate Court in this case,"* A-18 (emphasis added), that claim is analytically preposterous. Simply put, the procedures that were followed by the trial court and that are focus of OCF's procedural complaint in this Court necessarily predated their "adopt[ion]" by the Illinois Appellate Court. What OCF posits was a new policy, "adopted by the Illinois Appellate Court in this case," was anything but new; instead of "adopt[ing]" a new policy, that court simply reiterated a time-honored one, that evidence available at the time of trial must be introduced at that time and not afterwards, and that a reviewing court's consideration of the facts is confined to a review of the matters of record at the time of judgment.

excessive awards of punitive damages.[13] Illinois' procedures provided OCF with all the process that it needed and all the process that was due under the Constitution.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be promptly denied.[14]

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[13] *See, e.g., Loitz v. Remington Arms Co., Inc.*, 563 N.E.2d 397 (Ill. 1990) (setting aside punitive award of $1.6 million as unsupported by the evidence); *Kemner v. Monsanto Co.*, 576 N.E.2d 1146 (Ill.App.Ct. 1991) (setting aside punitive award of $16.25 million as unsupported by the evidence).

[14] The Court's recent grant of certiorari in *Honda Motor Co. v. Oberg*, 851 P.2d 1084 (Or. 1993), *cert. granted*, 62 U.S.L.W. 26 (U.S. Jan. 18, 1994) (No. 93-644) should not delay its prompt denial of certiorari in this case. In *Oberg*, the Oregon Supreme Court interpreted the Oregon Constitution to prohibit post-trial review of punitive damage awards for excessiveness. 851 P.2d at 1091 n.7. The question that the Court agreed to review is whether "Oregon's denial of *any* judicial review of compensatory and punitive damages verdicts for excessiveness violates the Due Process Clause of the Fourteenth Amendment." 62 U.S.L.W. at 26 (emphasis added).

The answer to the question presented in *Oberg* would not affect the Court's disposition of the instant case. Illinois, unlike Oregon, expressly authorizes trial and appellate courts to review punitive damage awards for excessiveness. ILL.REV.STAT. ch. 110, sec. 2-1207 (1989); *Hazelwood v. Illinois Gulf Central R.R.*, 450 N.E.2d 1199 (Ill.App.Ct. 1983). The Court should summarily decline to review state court decisions affirming awards of punitive damage where those states, unlike Oregon, clearly afford the litigants traditional procedural protections.

The complaints involved in the instant case were filed eight years ago. The verdict was returned by the jury almost four

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February 11, 1994

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years ago. Respondents have already endured a stay of the appellate process to await the Court's decision in *TXO*, a decision which, as respondents had anticipated, did not add any merit to OCF's complaints on appeal. Twelve Illinois judges – the trial judge, the unanimous appellate court, and the eight justices of the Illinois Supreme Court who considered OCF's petition for leave to appeal – have rejected OCF's constitutional arguments based on the clear precedents of this Court. Respondents should not be forced to endure the injustice of another purposeless delay. The Court should deny OCF's Petition for Writ of Certiorari immediately.